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Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *s.* 164. Hall *v.* Beckenham Corporation **Finnemore J. 716**

1876

Customs Consolidation Act, 1876 (39 & 40 *Vict.*, *c.* 36), *s.* 186. Beck *v.* Binks **Divl. Ct. 250**

1881

Army Act, 1881 (44 & 45 *Vict.*, *c.* 58), *s.* 175. Rex *v.* Secretary of State for War. *Ex parte* Price **Divl. Ct. 1**

1893

Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71, *s.* 4. Wilson & Sons *v.* Pike **C A. 176**

—— —— *s.* 22, *sub-s.* 1. Bishopsgate Motor Finance Corporation, Ld. *v.* Transport Brakes, Ld. Winsor Garage, Third Party **C. A. 322**

—— —— *s.* 35. E. & S. Ruben, Ld. *v.* Faire Brothers and Co., Ld. **Hilbery J. 254**

1899

Small Dwellings (Acquisition) Act, 1899 (62 & 63 *Vict.*, *c.* 44). Beeston and Stapleford U.D.C. *v.* Smith **Divl. Ct. 656**

1901

Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-s.* 4. Richmond Rating Authority and Surrey County Valuation Committee *v.* Ham River Grit Co., Ld. **Divl. Ct. 426**

1911

Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *ss.* 49 *and* 102, *sub-s.* 8. Edwards *v.* National Coal Board **C. A. 704**

1913

Mental Deficiency Act, 1913 (3 & 4 *Geo.* 5, *c.* 28), *s.* 11, *sub-s.* 1, *proviso*. Rex *v.* Secretary of the Board of Control and Another. *In re* Dawson. *Ex parte* Abdul Kayum **Divl. Ct. 183**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 9, *sub-s.* 1. Roppel *v.* Bennett. Same *v.* Davies **C. A. 115**

—— —— *s.* 9, *sub-s.* 1. Riordan *v.* Minchin **C. A. 137**

—— —— *s.* 12, *sub-s.* 1 (*a*). Alliance Property Co., Ld. *v.* Shaffer **C. A. 367**

—— —— *s.* 12, *sub-s.* 2, *proviso* (*i.*). Artillery Mansions, Ld. *v.* Macartney **C. A. 164**

—— —— *s.* 12, *sub-s.* 2, *proviso* (1.). Turner *v.* Baker - - **C. A. 605**

—— —— *s.* 12, *sub-s.* 3. Amphlett *v.* Dorrell - - **C. A. 276**

—— —— *s.* 15, *sub-s.* 3. Cow *v.* Casey **C. A. 474**

—— —— *s.* 17, *sub-s.* 2. Lee *v.* K. Carter, Ld. and Another - **C. A. 85**

1923

Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1. Roppel *v.* Bennett. Same *v.* Davies - **C. A. 115**

———— *s.* 10, *sub-s.* 1. Riordan *v.* Minchin - - **C. A. 137**

—— —— *s.* 10, *sub-s.* 1. Artillery Mansions, Ld. *v.* Macartney **C. A. 164**

—— —— *s.* 11. Insall *v.* Nottingham Corporation - - **C. A. 261**

1925

Land Charges Act, 1925 (15 *Geo.* 5, *c.* 22), *s.* 10, *sub-s.* 1, *Class C (IV)*, *sub-s.* 2, *s.* 13, *sub-s.* 2. Sharp *v.* Coates **C. A. 285**

Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 23, *sub-s.* 1. Helman *v.* Horsham and Worthing Area Assessment Committee **Divl. Ct. 62**

—— —— *s.* 37, *sub-s.* 10. John Laing & Son, Ld. *v.* Assessment Committee for Kingswood Assessment Area **C. A. 344**

1927

Landlord and Tenant Act, 1927 (17 & 18) *Geo.* 5, *c.* 36), *ss.* 4, 5. Ireland *v.* Taylor - - - **C. A. 300**

1928

Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 2. Parry *v.* Anglesey Assessment Committee - - **Divl. Ct. 246**

—— —— *s.* 4, *sub-ss.* 1, 2 (*a*). Richmond Rating Authority and Surrey County Valuation Committee *v.* Ham River Grit Co., Ld. **Divl. Ct. 426**

1932

Solicitors Act, 1932 (22 & 23 *Geo.* 5, *c.* 37), *s.* 47, *sub-s.* 1, *as amended by Solicitors Act*, 1941 (4 & 5 *Geo.* 6, *c.* 46), *s.* 23, *sub-s.* 1. Beeston and Stapleford U.D.C. *v.* Smith **Divl. Ct. 656**

1933

Rent and Mortgage Interest Restrictions (*Amendment*) *Act*, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3. Cow *v.* Casey **C. A. 474**

—— —— *s.* 16, *sub-s.* 1. Langford Property Co., Ld. *v.* Goldrich **C. A. 511**

1934

County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 48. Lee *v.* K. Carter, Ld. and Another - - **C. A. 85**

1937

Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 22, *sub-s.* 1. Whitehead *v.* James Stott & Co. **C. A. 358**

—— —— *s.* 26. Lavender *v.* Diamints, Ld. **C. A. 585**

Local Government Superannuation Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 68), *s.* 3, *sub-ss.* 1, 2; *s.* 8, *sub-ss.* 1, 2, 3, 5, 6, 7; *s.* 10, *sub-ss.* 1, 6; *s.* 12, *sub-ss.* 1, 2; *s.* 27, *sub-s.* 1; *s.* 40, *sub-ss.* 1, 3. Jobbins *v.* Middlesex County Council - **C. A. 142**

1938

Increase of Rent and Mortgage Interest (*Restrictions*) *Act*, 1938 (1 & 2 *Geo.* 6, *c.* 26), *s.* 7. Langford Property Co., Ld. *v.* Goldrich **C. A. 511**

Evidence Act, 1938 (1 & 2 *Geo.* 6, *c.* 28), *s.* 1, *sub-ss.* 1 (i.) (*b*) 3 *and* 4. Barkway *v.* South Wales Transport Co., Ld. **C. A. 54**

—— —— *s.* 1, *sub-s.* 3. Bain *v.* Moss Hutchison Line, Ld. **Birkett J. 51**

—— —— *s.* 1, *sub-s.* 3. Evon and Evon *v.* Noble - - **Birkett J. 222**

Food and Drugs Act, 1938 (1 & 2 *Geo.* 6, *c.* 56), *s.* 70, *sub-ss.* 1, 2. S. Stone and Sons (Hounslow), Ld. *v.* Pugh - - - **Divl. Ct. 240**

1939

Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *ss.* 3, 26. Beaman *v.* A.R.T.S., Ld. **C. A. 550**

Emergency Powers (*Defence*) *Act*, 1939 (2 & 3 *Geo.* 6. *c.* 62), *s.* 3, *sub-s.* 1 (*b*). Boissevain *v.* Weil **C. A. 482**

Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1, *sch. I.* Alliance Property Co., Ld. *v.* Shaffer **C. A. 367**

—— —— *s.* 3, *sub-s.* 1, *s.* 7, *sub-ss.* 1, 3. Langford Property Co., Ld. *v.* Goldrich - - - **C. A. 511**

—— —— *s.* 3, *sub-s.* 2 (*b*). Roppel *v.* Bennett. Same *v.* Davies **C. A. 115**

—— —— *s.* 3, *sub-s.* 2 (*b*). Riordan *v.* Minchin - - - **C. A. 137**

1944

Finance Act, 1944 (7 & 8 *Geo.* 6, *c.* 23), *s.* 11, *sub-s.* 1. Beck *v.* Binks **Divl. Ct. 250**

1946

Furnished Houses (*Rent Control*) *Act*, 1946 (9 & 10 *Geo.* 6, *c.* 34), *s.* 2. Rex *v.* Paddington and St. Marylebone Rent Tribunal. *Ex parte* Bell London & Provincial Properties Ld. - - - **Divl. Ct. 666**

—— —— *s.* 7. Roppel *v.* Bennett. Same *v.* Davies - - **C. A. 115**

1947

City of London (*Tithes*) *Act*, 1947 (10 & 11 *Geo.* 6, *c.* 31), *s.* 16. Langham *v.* Mayor, etc., of the City of London - - - **C. A. 208**

London County Council (*General Powers*) *Act*, 1947 (10 & 11 *Geo.* 6, *c.* **xvi**), *s.* 21, *sub-s.* 3 (*a*); *s.* 25, *sub-s.* 1. Stepney Borough Council *v.* Joffe - - - **Divl. Ct. 599**

RULES AND ORDERS JUDICIALLY CONSIDERED

R. S. C. Or. 14. MORGAN & SON, LD. *v.* S. MARTIN JOHNSON & CO., LD. **C. A. 107**

COW *v.* CASEY **C. A. 474**

—— *Or.* 25, *r.* 4. DAY *v.* WILLIAM HILL (PARK LANE), LD. **C. A. 632**

Defence (Finance) Regulations, 1939. HASTINGS & FOLKESTONE GLASSWORKS, LD. *v.* KALSON **C. A. 214**

—— —— *reg.* 2 (1) *as amended by Order of* 1940, *No.* 1484. BOISSEVAIN *v.* WEIL - - - **C. A. 482**

Defence (General) Regulations, 1939 (*St. R. & O.*, 1939, *No.* 927), *reg.* 56A (*as amended*), *paras.* (1) *to* (3), (6) *to* (8). BOSTEL BROS., LD. *v.* HURLOCK **C. A. 74**

—— —— *reg.* 68CB (1), (6). BALDWIN *v.* GURNSEY - - **C. A. 102**

1927

Plant and Machinery (Valuation for Rating) Order, 1927 (*St. R. & O.* 1927, *No.* 480), *sch.*, *class* 4. CARDIFF RATING AUTHORITY AND CARDIFF ASSESSMENT COMMITTEE *v.* GUEST KEEN BALDWIN'S IRON AND STEEL CO., LD. - - - **C. A. 385**

ROYAL WARRANTS ETC. JUDICIALLY CONSIDERED

1940

Royal Warrant for pay, appointment, etc., of the Army, 1940, *art.* 21. REX *v.* SECRETARY OF STATE FOR WAR. *Ex parte* PRICE - **Divl. Ct. 1**

1945

Army Order 83 *of* 1945. REX *v.* SECRETARY OF STATE FOR WAR. *Ex parte* PRICE - - - **Divl. Ct. 1**

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

REX *v.* SECRETARY OF STATE FOR WAR.

Ex parte PRICE.

1948
July 27.

Lord Goddard C.J., Singleton and Denning JJ.

Army—Emergency commission—Officer on release leave—Ordered to return to Italy—Arrest and trial by court martial at Rome—Conviction and sentence for offences under Larceny Act—Duration of subjection to military law—" On active list "—Certiorari—Army Act, 1881 (44 & 45 *Vict., c.* 58), *s.* 175*—Royal Warrant for pay, appointment, etc., of the Army*, 1940, *art.* 21*—Army Order* 83 *of* 1945.

An army officer while on release leave and receiving the full pay of his rank is still on the active list and subject to military law.

Whether a Divisional Court has jurisdiction to grant an order of certiorari to bring up and quash the decision of a court martial sitting out of the jurisdiction discussed, but not decided.

MOTION for order of certiorari.

The applicant, Lionel George Price, an army officer, was on November 8, 1945, sent on release leave. Ten days later he received a telegram informing him that his release leave had

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been temporarily suspended and that he was to return to the Royal Engineers' Depot, Halifax, immediately, for return to the Central Mediterranean Forces, who wanted his assistance in clearing up an investigation. He obeyed the order of recall and arrived in Rome on December 4. He was there placed under close arrest, and in the following March he was tried by court martial, convicted of offences under the Larceny Act, including charges of false pretences, and sentenced to imprisonment, which he had now served. He now applied for an order of certiorari on the ground that being on release leave he was no longer at the time of his arrest subject to military law.

Peter Lewis for applicant. The first question is whether this court has jurisdiction to grant certiorari in respect of a trial held in Rome. The general principle is correctly stated in the Manual of Military Law, 1929 ed., p. 135, chap. 8, and I take that as part of my argument. The point has never been specifically decided, but my submission is that where the record of the court is in England, the sentence is also served in this country, and the applicant was tried under a statute which operates in the United Kingdom, this court has jurisdiction to grant the order. The fact that the trial took place abroad does not affect the jurisdiction. The record being in this country this court has control, on the principle of effectiveness. The headnote of the report of *In re Mansergh* (1) does not accurately recite the effect of the judgment. For the purpose of the judgment it was merely assumed that the court had jurisdiction, the ratio decidendi being that as only the army status of the applicant was affected, and the sentence was only dismissal, it might have been imposed under the royal prerogative without a court martial.

[DENNING J. That trial was in Calcutta, where there were civil courts which could have controlled the court martial if it exceeded its jurisdiction.]

In consequence of civil courts coming into existence in other parts of the empire the law has been altered since that case. I submit that the opinions expressed in *Mansergh's* case which are against me were merely obiter.

[LORD GODDARD C.J. If while in prison the applicant had made application for habeas corpus of course we would have considered it.]

So far as discretion is concerned it is submitted that as

(1) (1861) 1 B. & S. 400.

Boydell's case had not been decided, and the applicant did not know of his rights, this court will exercise its discretion. If this court is against my contention that the expressions of opinion in *Mansergh's* case are obiter, then I ask this court to differ from that case. Once an officer has ceased to be subject to military law he can only be put on trial within three months. See the Army Act, 1881, s. 158. The moment a soldier goes on release leave he ceases to be subject to military law. He is no longer on the active list and the payments which he receives during that leave is not "pay" but benefits in the nature of gratuities.

H. L. Parker (for respondent): Army Order No. 4 of 1946 deals with pay and allowances during release leave.

The fact that the Army authorities have considered it desirable to issue a further pay warrant enforces my argument that the payments Price received during release leave were not pay under the Royal Warrant of 1940.

Sir Hartley Shawcross A.-G. and *Parker* for respondent were not called on.

LORD GODDARD C.J. This motion is no doubt brought on account of the decision of this court in *The King* v. *Governor of Wormwood Scrubbs Prison and Another* (1) but that case (*Boydell's* case) differs in so many important respects from this case that it is certainly no authority for saying that the officer in this case is not subject to military law. Indeed, if it is an authority at all in this case, it seems to me it is an authority exactly the other way. If this officer was on the active list, there can be no question but that the military court had power to try him. There is no doubt that his superior officers had jurisdiction and authority to require him to proceed to Rome and, when he arrived at Rome, he was subject in all respects to military law.

Our attention has been called to certain release regulations from the army and the circumstances under which this officer was released, and attention has been called, as it was in *Boydell's* case (1), to the Royal Warrant of June 18, 1945, when His Majesty was pleased to state the conditions, and so forth, under which an officer who had been granted an emergency commission could be released from military duty. The warrant states that His Majesty deems it expedient to provide that officers granted emergency commissions in the

(1) [1948] 2 K. B. 193.

land forces for service with the regular army may be released from military duty before the termination of the "present "emergency," and then provides that an officer may be released from military duty, in accordance with Army Council instructions, and placed on the unemployed list, with liability to be recalled if and when required until the end of the "present "emergency." The instructions of the Army Council were that the gentlemen who were holding emergency commissions and were to be released were divided into three classes. The division into the three classes does not affect this case. It is conceded that this officer was in what was called Class A, and the instructions which the Army Council gave were not instructions which amounted to saying that an officer was released on any particular day, in the sense that a moment of a day was fixed, but the scheme that was adopted was that he was granted release leave, namely, fifty-six days leave "with pay "at the rate appropriate to the highest paid rank held since "the date of cessation of hostilities in Europe," and there were certain other provisions with regard to increased leave with pay according to the number of days he had served overseas. He is subject to military law so long as he is an officer on the active list, and an officer on the active list means "officers "of the regular forces, whether on full pay, half-pay or other-"wise, before their retirement." That is because in s. 175 of the Army Act it is provided: "The persons in this section "mentioned are persons subject to military law as officers, and "this Act shall apply accordingly to all the persons so specified; "that is to say (1.) Officers of the regular forces on the active "list, within the meaning of any Royal Warrant for regulating "the pay and promotion of the regular forces." That is why, in discovering whether an officer is an officer on the active list, one has to have regard to the provisions of the Royal Pay Warrant which, as I have said, provides that officers on the active list includes officers of the regular forces whether on full pay, half-pay or otherwise. While this officer was on release leave, as it is called, he was in receipt of full pay. He was in receipt of full pay as laid down in this pay warrant, and it seems perfectly clear that so long as he was receiving full pay, which he would do for fifty-six days, he was an officer on the active list. He was an officer who could be recalled at any moment, who was recalled, and who answered his recall notice.

It seems to me that it is impossible to say that this case in any way falls within the decision in *Boydell's* case (1), which was a case in which an officer was arrested a year or more after his release leave had ceased and when he was no longer in receipt of full pay. The court in that case called attention to the fact that the pay and liability to perform services depended the one on the other. The court said this: "But, "even if a released officer could be held to be an officer of the "regular forces, to be subject to military law he must be on "the active list within the meaning of any royal warrant for "regulating pay and promotion. This at once calls attention "to the close and natural connexion between pay and the "active list. The one would seem complementary to the "other, for while there may well be cases of an officer receiving "pay, though not called on to perform services, for instance, "those on half-pay due to medical unfitness, it would be "remarkable indeed if an officer were on the active list and yet "not entitled to any pay." Here, he was entitled to pay. He was granted leave, and if he was granted leave from the army it means he is a person who is released temporarily from his duties on leave, and that leave can be terminated at any moment. I can see no difference between this case and an officer on privilege leave, the only difference being that this leave is given in the hope and prospect that his active service in the Army will terminate at the end of the leave; but, so long as he is receiving full pay it seems to me he is clearly an officer on the active list. Therefore, at the time when this gentleman was ordered to report to Rome he was an officer on the active list, and I think there is no more to be said on that point.

I will very briefly mention one other point which was argued and which the court invited Mr. Lewis to discuss, although, in view of the decision which we have given that this officer was liable to military law at the time of the arrest and trial, it is unnecessary for the decision. Our attention was called to *In re Mansergh* (2). In that case I think the court did, without deciding it, indicate that their opinion was that this court had no jurisdiction to grant a writ of certiorari to bring up and quash the proceedings of a court martial sitting out of the jurisdiction. I have only to say this about that case because I think it is desirable it should be understood that the point may still be open: In that case the court martial had sat in India and, as is well known, there were High Courts that had sat in the

(1) [1948] 2 K. B. 193. (2) 1 B. & S. 400.

different Presidencies and other parts of India, in 1861, for very nearly a hundred years. I forget when Sir Elijah Impey was appointed chief justice, in the time of the East India Company, but certainly for a great number of years before the beginning of the nineteenth century there had been High Courts in India, and if an officer was wrongly arrested or brought before a court martial in India there was a court to which he could apply for habeas corpus. Blackburn J., I notice, said: "Assuming that this particular court martial had no "jurisdiction over the applicant, then comes the question, "can this court quash the proceedings of a court held in "India? No more, I think, than they could quash the "proceedings of a court in France." He was therefore considering the case, though he does not say so in terms, where the court might be asked to quash a conviction which had taken place in a country like India or a country like France, in both of which there were courts sitting. I do not mean to say that this court would necessarily hold that it had no jurisdiction if a court martial were held in a place where there were no civil courts to which a man could apply, if he was a British subject and tried before a court consisting of British subjects and under a British Act of Parliament. I do not mean to let it go forth that this court is necessarily of opinion that that passage in *Mansergh's* case (1) means that this court has no jurisdiction to grant the writ. It is not, however, necessary to give a concluded opinion on the case, but I can conceive that very different considerations may arise if the court martial is held in a country where there are courts that can deal with the matter, or if it is held in a place where there are no courts. But, as it is clear that this gentleman was subject to military law, it follows that there is no ground for ordering the writ of certiorari to issue, and this application is refused.

SINGLETON J.: I am of the same opinion. It may well be that the success of the applicant in *Boydell's* case (2) led to this application, but the two cases are quite different both in regard to the remedy sought and also on the facts. At the time he was recalled this officer was on leave. He was on that which is described as release leave; it was in fact fifty-six days' leave "with pay at the rate appropriate to the highest paid rank "at the date of the cessation of hostilities." He recognized he was on leave and he reported accordingly. If he had not

(1) 1 B. & S. 400. (2) [1948] 2 K. B. 193.

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done so he would have been committing an offence against the Army Act, and subject, so it seems to me, to penalties. In that respect the case is wholly different from *Boydell's* case (1). As to the application generally, if the facts had been such that the court might have thought it right to grant a writ of certiorari, and I say no more as to that, still the question would have arisen whether in the circumstances it would be right to grant that remedy. I notice that in *Mansergh's* case (2), to which my Lord referred, there was reference to the fact that there had been great delay. In the course of the argument Crompton J. said: "Besides, even if we thought the court "martial wrong, we ought not, in the exercise of our discretion, "to interfere with proceedings that took place three years ago," and at the end of his judgment Blackburn J. said: "I there-"fore entertain exceeding doubt if we could grant this certiorari "under any circumstances whatever. But if we could, then "comes the question of discretion; and, looking at the length "of time which has elapsed, and the futility of the proceeding, "I think this is not a case in which we ought to exercise our "discretion to grant the writ." For myself, I would say that the court ought not readily to grant the writ when there has been delay such as there has been in this case.

DENNING J.: I agree.

Motion dismissed.

Solicitors for applicant: *A. Kramer & Co.*
Solicitor for respondent: *Treasury Solicitor.*

(1) [1948] 2 K. B. 193. (2) 1 B. & S. 400.

A. W. G.

Affirmed. ROYAL GREEK GOVT. *v.* MIN. OF TRANSPORT. [1949] 1 K. B. 525

ROYAL GREEK GOVERNMENT *v.* MINISTER OF TRANSPORT.

1948
Apr. 23.

Sellers J.

Shipping — Charterparty — Time Charter — Suspension of hire in case of "deficiency of men . . . . or other accident"—Full complement of crew on board but unwilling to work—War—Refusal of crew to sail except in convoy.

A time charter dated August 29, 1941 contained a suspension of hire clause according to which no hire had to be paid in the event of "deficiency of men, ... [further specified events]

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

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ROYAL GREEK GOVERNMENT *v.* MINISTER OF TRANSPORT.

" . . . . or other accident, either hindering or preventing the " working of the vessel and continuing for more than twenty-four consecutive hours." On December 16, 1943, while the vessel was at Newcastle, Australia, her officers and crew refused to sail except in convoy, and because of this refusal the vessel remained at Newcastle until December 23, 1943, when the officers and crew agreed to proceed without convoy. During that time a full complement numerically of officers and crew were on board but they were unwilling to work.

Held, that the expression " deficiency " in its plain meaning meant numerical insufficiency, and that that was the meaning of the term in the suspension of hire clause of the charterparty, though in some usages it might mean something more ; different or additional words would have been used if it had been intended to place the vessel off hire because, for some reason, the men refused to work.

Held, further, that the wilful refusal of officers and crew to sail except in convoy did not have any element of " accident " ; it did not in any way resemble any of the other specified events which would serve to put the vessel off hire.

The Torbryan [1903] P. 194 distinguished.

Inman Steamship Co. Ld. v. *Bischoff* (1882) 7 App. Cas. 670 referred to.

SPECIAL CASE STATED by arbitrator for the decision of the court.

By a time charter dated August 29, 1941, the Minister of Transport agreed to charter the vessel *Ilissos* from the Royal Greek Government as disponent shipowners for a hire of 16*s*. 6*d*. per ton per month. The charterparty by cl. 4 provided that while the vessel was on hire the charterer was to provide and pay for all coals, and included the following provisions relating to suspension of hire and deficiency of crew : 11 (*a*) : " In " the event of drydocking or other necessary measures to " maintain the efficiency of the vessel, deficiency of men or " owners' stores, breakdown of machinery, damage to hull or " other accident, either hindering or preventing the working " of the vessel and continuing for more than 24 consecutive " hours, no hire to be paid in respect of any time lost thereby " during the period in which the vessel is unable to perform " the service immediately required." 34 : " (addendum to " cl. 11(*a*)). Notwithstanding the provisions of cl. 11 (*a*), " it is agreed that in the event of loss of time due solely to " inability to get or to complete a crew (*a*) full hire will be paid " for the first 72 hours of such loss of time, and (*b*) in the event " of such loss of time taking place at a port in the United " Kingdom or in ports in the British Empire overseas and "continuing beyond such 72 hours, half hire will be paid for a "further period of 72 hours, but thereafter hire shall cease "until the vessel is again ready to resume her service."

On December 16, 1943, while the vessel was subject to the charter and was ready to sail from Newcastle, Australia, her officers and crew refused to sail except in convoy, and because of this refusal the vessel remained at Newcastle until on December 23, 1943, the officers and crew agreed to proceed without convoy. There was at all material times a full complement numerically of officers and crew, but they were not willing to work, and consequently the vessel was unable to perform the service immediately required.

The owners claimed hire during the delay at Newcastle, and the claim was resisted by the charterer. The dispute was submitted to arbitration and the arbitrator, Mr. Patrick Devlin K.C., held that there was not at any material time a "deficiency of men" or "other accident" within the meaning of cl. 11 (*a*) and that the charterer was not relieved by the provisions of that clause and its addendum from the payment of the full hire. The arbitrator gave his award in favour of the shipowners in form of a special case.

Sir William McNair K.C. and *Eustace Roskill,* for the charterer, the respondent. There is only one case in which the phrase "deficiency of men" has been judicially considered. It is *Ratcliffe & Co.* v. *Compagnie Generale Transatlantique* (1), but that case is not of much assistance here. There are four reasons for adopting the charterer's construction: (1.) it conforms to the dictionary meaning of "deficiency"; (2.) it gives a sensible and businesslike meaning to the clause which the owners' construction does not, Lord Blackburn in *Inman Steamship Co., Ld.* v. *Bischoff* (2); (3.) it gives the same meaning to the word "deficiency" wherever it occurs in connexion with men and stores; (4.) it is consistent with the scheme of the charterparty as a whole which requires the owners to provide the necessary officers and men able and willing to perform the chartered services.

The other point taken before the learned arbitrator arises on the words "other accident." The refusal of the crew to sail except in convoy is a happening which, although caused by human agency is, as between owners and charterer, fortuitous and unexpected. That, on the authorities, is sufficient to

(1) (1918) 24 Com. Cas. 40.

(2) (1882) 7 App. Cas. 670, 685.

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constitute an accident. *The Torbryan* (1); *Fenwick* v. *Schmalz* (2); *Mudie & Co.* v. *Strick* (3).

Sir Robert Aske K.C. and *A. A. Mocatta* for the owners, the claimants. Two rules of construction apply to this case: First, the principle set out by MacKinnon L.J., in *Sea and Land Securities, Ld.* v. *William Dickinson & Co.* (4), where the learned judge said: "In the present case the charterers claim "that they need not pay hire . . . . Can they establish that "claim?" Bailhache J. in *Admiral Shipping Company, Ld.* v. *Weidner, Hopkins & Co.* (5) understood "deficiency of "crew" as meaning want of crew, and that is the right meaning in the present case. Secondly, cl. 11 (*a*) of the charterparty is an exceptions clause. There is a primary obligation on the charterer to pay hire under cl. 6 and the ordinary principle of construction has to be applied that the person setting up the exceptions clause derives no protection from it unless it is unambiguous.

In the Oxford English Dictionary "deficiency" is defined as "want, lack, absence"; all those denote shortage, i.e., shortage in numbers. [Counsel referred to other clauses of the charterparty.] Strikes, lockouts, stoppage or restraints of labour are specifically dealt with in cl. 13.

As regards the words "or other accident," there is no authority where it has been held that the word "accident" covers an intentional act. McCardie J. in *J. and J. Denholm, Ld.* v. *Shipping Controller* (6), relies on the definition of Lord Lindley in *Fenton* v. *Thorley* (7), which can be regarded as authoritative. Collins L.J., in *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Company* (8), said that "the wilful act takes from the catastrophe the accidental "character."

Cur. adv. vult.

SELLERS J. (who read his judgment): The only point argued before the learned arbitrator was whether cl. 11 (*a*) and its addendum operated to relieve the respondent in whole or in part from his obligation to pay hire during the period of the delay at Newcastle and to provide and pay for coals consumed during that period. The learned arbitrator found: "In so

(1) [1903] P. 194.
(2) (1868) L. R. 3 C. P. 313.
(3) (1909) 100 L. T. 701.
(4) [1942] 2 K. B. 65, 70.
(5) [1915] 1 K. B. 429, 436.
(6) [1920] 4 Ll. L. Rep. 426, 427.
(7) [1903] A. C. 443, 453.
(8) [1898] 2 Q. B. 114, 127.

" far as it is a question of fact I find, and in so far as it is a " question of law I hold, that there was not at any material time " a deficiency of men or other accident, either hindering or " preventing the working of the vessel, or any inability to get " or to complete a crew." He also held " that cl. 11 (*a*) and its " addendum do not relieve the respondent in whole or in part " from his obligation to pay hire, that the claim succeeds and " that the counterclaim fails." Then he says: " Subject to " the decision of the court, I award that the respondent do pay " to the claimants the sum of 388*l.* 17*s.* 6*d.* "—an award in favour of the shipowners.

In argument here both sides invited the court to look at the charterparty as a whole and referred to various other clauses. The shipowners had, under this charterparty, to place the vessel at the disposal of the charterer in every way fitted for ordinary cargo service, with a full complement of officers and crew, which means officers and crew of reasonable skill and competence in their respective duties. Clause 13 is directed to limiting the shipowners' liability to the charterer for loss, damage or delay, and excludes loss arising or resulting from strikes, lockouts or stoppage or restraint of labour (including the master, officers or crew) whether partial or general. That clause is made expressly subject to cl. 11 (*a*) and the addendum thereto, but it was not suggested by either side that these words had any significance, except perhaps to emphasize that the suspension of hire clause stands unimpaired. No breach of contract was alleged, and the position is that the charterer is liable to pay hire unless there is a provision in the contract by which it has been agreed that hire shall be suspended and the charterer brings himself within the provision. The charterer accepted this obligation and alleged that the facts found establish either " deficiency of " men " or "other accident." If he is right about this he relies on the finding of fact that there was no inability to get or complete a crew, and therefore the charterer, it is submitted, is not liable for the limited hire under cl. 34. It was argued by counsel on his behalf that the view taken by the arbitrator that " deficiency of men " means " numerical insufficiency " was a narrow view; that " deficiency " could be, and was here, both quantitative and qualitative; that in its context it required not only sufficiency in numbers but that the men should be able and willing to work. It was submitted that the dictionary meaning was wide enough to cover not only insufficiency in numbers but also the lack of willingness to work for whatever

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reason. Reference was made to Lord Blackburn's well-known observations in *Inman Steamship Co., Ld.* v. *Bischoff* (1): "Constructions . . . . leading to absurd and unreasonable "results will be avoided if this can be done without violence to "the terms used, because, where intention is not clearly "expressed, the parties are not to be presumed to have meant to "make an absurd or unreasonable contract." The arbitrator's view, it was said, would involve that if so many of the officers and crew were sick on board that the vessel could not be worked the vessel would not be off hire because the numbers would be there, but if the sick men were removed to hospital on shore it would be different. A comparison was made between "deficiency of men" and "deficiency of owners' stores," and counsel illustrated the case of stores being present on board but bad and unfit for human consumption, or lubricant of a wrong quality or kind for the engines and therefore unserviceable. It was said that the stores would be numerically there and in that sense not deficient, but that the stores would properly be described as deficient. Notwithstanding some attractiveness in this argument, I do not find it on examination to be acceptable. The comparison between "deficiency of "men" and "deficiency of stores" does not, in my view, assist the charterer's contention. Stores which are bad or unfit for consumption or use can be regarded as no longer existing stores, and therefore any shortage in the remaining supplies would be "deficiency of stores." Failure to provide lubricant which was suitable for the vessel would be a breach of the charterparty by the shipowners, for which they would be liable, subject to any protection provided by cl. 13. The inability of officers and men to work through sickness or injury would, in my view, amount to "deficiency of men" and the clause would apply if the working of the vessel was hindered or prevented thereby, and it would make no difference if the incapacitated members of the crew were on the ship or in hospital on shore. Physical inability to work is different in quality and character from refusal to work when full capacity to do so exists. In my opinion, the provision "deficiency of "men" in the suspension of hire clause is directed to putting the vessel off hire when a complement of officers and crew for working the ship is not available. Here there was no failure in the complement. The complete crew was present in the ship, able to work, but, for the time being, unwilling to

(1) 7 App. Cas. 670, 685.

take the ship to sea, except in convoy. On these facts the learned arbitrator has found that there was not at any material time a "deficiency of men." I am of opinion that his decision was right in law. No real guidance on the point seems to be available in any of the authorities. I think that different or additional words would have been used if it had been intended to place the vessel off hire because, for some reason, the men refused to work. Clause 13 refers to "strikes, lockouts or "stoppage or restraint of labour (including the master, officers "or crew)." No such words occur in the suspension of hire clause. "Deficiency" in its plain meaning does mean "numerical insufficiency." It may in some usages mean something more, but I am of opinion that that is its meaning in *this* clause of the charterparty. Inability to get or complete a crew my be due to a variety of causes, including a refusal of men to sign on because of war conditions or the nature of the voyage. If a deficiency or shortage of men had arisen in that way then it would seem that the charterer would be liable only for the limited hire under cl. 34. But here the arbitrator has found no inability to get or to complete a crew, for the vessel at all times had her full complement.

Further, or alternatively, the charterers rely on the provision "or other accident." Notwithstanding that the crew's refusal to work was wilful and intentional, it was said that the event as far as the parties to the contract were concerned was fortuitous and unexpected and was properly described as an accident. Reliance was placed on *The Torbryan* (1), in the Court of Appeal, but that was a very different case, as appears from the findings of Phillimore J. in the trial court (2). In that case the Court of Appeal seem to have found that the parties swept all the enumerated exceptions "into the category of "accidents." I do not find it possible to do so here. The wilful refusal of the officers and crew to sail except in convoy does not appear to me to have any element of "accident." It is not an accident and it in no way resembles any of the other enumerated events which would serve to put the vessel off hire.

I am, therefore, of the opinion that the learned arbitrator's decision on this point also was right in law. The two questions asked of the court are set out in para. 7 of the special case: (1.): "Whether on the facts found by me and on the true "construction of the charterparty the claimants are entitled to "recover 388*l.* 17*s.* 6*d.* from the respondent": and (2.):

(1) [1903] P. 194.
(2) [1903] P. 35.

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"Whether on the facts found by me and on the true construction of the charterparty the respondent is entitled to recover 964*l*. 6*s*. 1*d*. from the claimants." The result of this judgment is that the answer to the first question is "Yes" and the answer to the second question is "No." Therefore, the award stands.

Award confirmed.

Solicitors for owners: *Holman, Fenwick & Willan.*
Solicitor for charterer: *The Treasury Solicitor.*

1948
Apr. 23.

Sellers J.

ARGONAUT NAVIGATION COMPANY LIMITED *v.* MINISTRY OF FOOD; S.S. "ARGOBEC."

Shipping — Charterparty — Demurrage — When loading completed—Bulk cargo—Wheat—In 'tween decks to be stowed in bags—Load put on board but not bagged.

A steamer chartered to carry a bulk cargo is not loaded until the cargo has been loaded and also bagged, if so required for safety or by regulation, in the 'tween decks. In order to avoid demurrage the bulk must be delivered in sufficient time within the lay days to allow this to be done before their expiry.

The charterparty, which was in the approved Baltimore Berth Grain form, provided "steamer to be loaded according to berth "terms . . . . and if detained longer than five days . . . . "charterer to pay demurrage." The ship was a two-deck steamship, and the port regulations at the port of loading provided that bulk grain might be carried to full capacity in all lower holds and in the feeders, but in the 'tween decks had to be stowed in bags. The bagging of grain in the 'tween decks was also necessary for reasons of safety of the ship. On the day when loading was completed the ship, which was to carry a load of wheat, was already on demurrage; between 8.45 a.m. and 1 p.m. loose wheat was loaded for the purpose of bagging, whereby the ship was brought down to her marks at 1 p.m., and from 1 to 3 p.m. no further cargo was taken in but the wheat was bagged for stowage in the 'tween decks.

Held, that the steamer could not be said to be loaded until 3 p.m. The loading operation was not completed until the cargo had been taken on board and put into bags for the purpose of carriage in the 'tween decks.

Held, further, that it made no difference whether the vessel was already on demurrage or not.

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law]

Harris v. *Best, Ryley & Co.* (1892) 68 L. T. 76, applied.
C. Wilh. Svenssons Travaruaktiebolag v. *Cliffe Steamship Co.* [1932] 1 K. B. 490 followed.

ACTION.

By a charterparty in approved Baltimore Berth Grain form dated September 11, 1946, it was agreed between the plaintiffs, the owners of the Canadian steamship *Argobec*, and the Minister of Food as charterer that " the said steamship should, with " all convenient speed, sail and proceed to " certain named ports, including Montreal and Sorel, " one port only, and there " load, always afloat, from the charterers of their agents, a " full and complete cargo of [inter alia] wheat in bulk and/or " flour in bags." Orders as to loading port were to be given as per cl. 13 attached. The vessel was to load under inspection of underwriters' agents, at her expense, and to comply with their rules, not exceeding what she could reasonably stow and carry, and being so loaded was to proceed to one safe port in the United Kingdom or on the Continent as ordered, and there deliver her cargo. The charterparty further provided as follows : " Steamer to be loaded according to berth terms, " with customary berth despatch, and if detained longer than " five days (Sundays and holidays excepted) charterer to pay " demurrage as per cl. 19 attached, provided such detention " shall occur by default of charterer or his agents. Notification of the vessel's readiness must be delivered at the " office of the charterers, or their agents, at or before 4 p.m. " (or at or before 12 noon, if on Saturday), vessel also having " been entered at the Custom House, accompanied by pass of " the inspector of vessel's readiness in all compartments, the " lay days will then commence at 7 a.m. on the next business " day whether in berth or not." The provision that the vessel was to load under inspection of underwriters' agents and to comply with their rules was applicable to vessels loading in United States ports only ; loading of grain at Montreal, and also at Sorel, a port on the St. Lawrence some forty miles downstream from Montreal, was subject to similar regulations laid down by the port warden of Montreal. The regulations were of statutory force and enforceable by fines. They provided : " The master of any vessel intending to load grain for any port " not within the limits of inland navigation "—that is to say, any foreign port—" shall notify the port warden and make " arrangements for a preliminary survey " : and : " The port "warden, if requested, shall issue within 24 hours of the "completion of such preliminary survey a written report setting "out the repairs and work necessary to render the vessel fit "to carry her proposed grain cargo and any modifications "considered necessary for the erection of shifting boards, "feeders, etc."

The *Argobec* was a two-deck steamship, and as regards such ships the regulations provided that bulk grain may be carried to the full capacity of all lower holds, provided properly constructed feeders were fitted in the hatches and trunked in the 'tween decks. Such feeders were to contain not less than 2½ per cent. and not more than 8 per cent. of the capacity of the hold they were designed to feed. All other grain in the 'tween decks had to be in bags, complying with regulations affecting shifting boards and dunnage. Apart from this regulation, it was necessary for such cargo to be bagged to secure the safety of the ship and the proper stowage of the cargo. The regulations further prescribed that until the master of a vessel produced to the Canadian customs authorities a certificate from the port warden to the effect that "all the requirements of the "regulations have been fully complied with, he is unable to "secure a clearance for his vessel to leave the port of Montreal "for any port not within the limits of inland navigation." The *Argobec* was prepared for the loading of a cargo of grain before and on her arrival at Montreal, and at 1.30 p.m. on October 7, 1946, a preliminary survey having been held, the port warden's certificate was issued that the vessel was fit to carry a grain cargo. Written notice of readiness, coupled with the port warden's certificate, was given by the master to the defendants' agents at Montreal at 1.45 p.m. on the same day, and the lay days accordingly began at 7 a.m. on October 8. No cargo was loaded by the defendants or their agents at Montreal, but in the afternoon of October 10 the master received orders to proceed on the following day to Sorel to load grain. The vessel proceeded accordingly and arrived at Sorel at 12.45 p.m. on October 11, and her master there obtained and delivered to the defendants' agents a certificate of the Sorel port warden that the vessel was ready to load a full cargo of grain as from 1 p.m. on that day. Loading then took place intermittently, by putting on board the vessel bulk wheat by means of elevators. Then the lay days expired and the vessel came on demurrage at 7 a.m. on October 15. By 8.45 a.m. on October 17 as much wheat as could in compliance with the

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regulations be carried by the vesel in bulk had been put on board, the holds and feeders were full and some loose wheat had been put in the 'tween decks, where the stevedores had begun bagging wheat in bags provide by the plaintiffs. As the loose wheat in the 'tween decks was bagged more loose wheat was poured in from the elevators at a rate reduced to enable the stevedores to proceed with the bagging and the last wheat was put on board at 1 p.m., by which time the vessel was down to her marks. Bagging of the loose wheat to be carried in the 'tween decks was not completed until 3 p.m., and the Sorel port warden then issued his certificate that all the requirements of the regulations had been complied with. In all, about 14,000 bags, containing about 28,306 bushels of wheat, were stowed in the 'tween decks. The total time actually used between 3.30 p.m. on October 11, and 3 p.m. on October 17 in putting on board the said cargo and bagging that portion of it to be carried in the 'tween decks other than in the feeders was one day, twelve hours and twenty minutes. The bagging of the wheat carried in bags in the 'tween decks was carried out by stevedores employed by the plaintiffs with all reasonable dispatch and without any default by the plaintiffs or their stevedores, and the operation of bagging could not reasonably have been completed before 3 p.m. on October 17. It was agreed that the vessel was on demurrage from 7 a.m. on October 15 to 8.45 a.m. on October 17, a period of two days, one hour, forty-five minutes.

A. A. Mocatta for the owners, the plaintiffs.
Eustace Roskill for the charterers, the defendants.

Cur. adv. vult.

SELLERS J. read the following judgment. The plaintiffs, as owners of the Canadian steamship *Argobec*, sued the Ministry of Food under a charterparty entered into with the Minister of Food, and it has been stated by counsel that this is the first case which has come before the courts where the Crown Proceedings Act, 1947, has been invoked. The claim is for a declaration that the defendants are liable to pay demurrage under the charterparty, or alternatively for a small sum of money as demurrage due. The Ministry on their part resist the claim and seek a decision on two points which it is said frequently arise under this type of charterparty: firstly, whether, if the lay days expire at the moment when the wheat in bulk has been put on board to the maximum amount permitted, any time occupied thereafter either in the process of allowing grain to fall slowly into the 'tween decks of a vessel to be bagged as the port regulations demand, or the time actually occupied in stowing the cargo after the elevators have stopped delivering, should count as loading time ; and, secondly, in the event of the answer to the first question being in the negative, whether it makes any difference if the vessel is already on demurrage at the time when the final quantity of wheat is put on board.

The dispute between the parties was with regard to the two periods on October 17, 8.45 a.m. to 1 p.m., during which time wheat was being loaded for the purpose of bagging, and which was sufficient by 1 p.m. to bring the vessel down to her marks, and therefore to constitute a full and complete cargo, and the period from 1 p.m. to 3 p.m., during which time no further cargo was taken in, but the bagging was being completed and the cargo was being stowed as the regulations required and so as to give safety and stability to the vessel.

Under the charterparty the shipowner has to place the ship at the specified port and there load from the charterers or their agents wheat in bulk according to berth terms. Five days (Sundays and holidays excepted) are allowed for the steamer to be loaded, and if she is detained longer than five days the charterer is to pay demurrage if the detention occurs by the default of the charterer or his agents. What is the obligation created by the agreement " to be loaded " ? There is, I think, high authority which gives guidance on this point. Lord Esher M.R., in *Harris* v. *Best, Ryley & Co.* (1), answers the question in this way (2) : " Loading is a joint act of the shipper " or charterer and of the shipowner ; neither of them is to do it " alone, but it is to be the joint act of both. What is the " obligation on each of them in that matter ? Each is to do " his own part of the work, and to do whatever is reasonable " to enable the other to do his part. This puts upon the shipper " the obligation of bringing the cargo alongside the ship, and of " doing a certain part of the loading. What is that part of the " loading ? By universal practice the shipper has to bring " the cargo alongside so as to enable the shipowner to load the " ship within the time stipulated by the charterparty, and to " lift that cargo to the rail of the ship. It is then the duty

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(1) (1892) 68 L. T. 76.

(2) Ibid. 77.

"of the shipowner to be ready to take such cargo on board and "to stow it in the vessel. The stowage of the cargo is the sole "act of the shipowner. What is a reasonable course of action "for both parties? The shipper has all the lay days within "which to bring his cargo to the ship, and, if he did not act "reasonably, he might bring it all upon the last of those days; "to do so would be unreasonable; he must act reasonably and "bring the cargo alongside in sufficient time to enable the "shipowner to do his part within the lay days. The ship-"owner must receive and stow the cargo reasonably as it is "brought alongside." Then there is the judgment of Lord Wright, when he was Wright J., and was sitting in this Commercial Court, in *C. Wilh. Svenssons Travaruaktiebolag* v. *Cliffe Steamship Co.* (1), where he says (2): "It has been "contended very strenuously by Mr. Van den Berg that that "stage"—[that is a stage of the voyage]—"had been reached, "because, in his submission, loading for this purpose means "simply the reception of goods on board, and the moment the "last parcel of cargo which it is intended to load is placed on "the vessel the loading is completed notwithstanding the fact "that some stowage may be necessary and may commonly "be done. I do not think that that is the law. I think that "in a case like this, and, indeed, in most cases, the mere "reception or dumping down of the cargo on the ship does not "involve the completion of the loading, because I think that "the operation of loading involves all that is required to put the "cargo in a condition in which it can be carried." I am now going to read a little further by way of illustration: "In this "case the operation of stowing the cargo was comparatively "simple. The pit props came up from the water in the ship's "slings and were slung on to the deck. Then the sling was "released, but, before it was released, the sling was put in "such a position that the props would fall in the proper "direction—that is, lying fore and aft—and would more or less "sink into their places. Some operation of stowing, however, "was necessary in respect of each such sling—some props "would not fall in the right position and would have to be "straightened out and the props generally would have to be "arranged so that they would lie as closely as possible to-"gether with their round sides as neatly in contact as could be "achieved. That was a small operation, no doubt, but it was "done sling by sling before the next sling could come on board,

(1) [1932] 1 K. B. 490. (2) Ibid. 494.

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"and it had to be done in respect of the last load." Then a little further on he said: "If it were necessary to decide the matter, "but it is not, I should also hold that in the facts of this case the "lashing was a necessary part of the operation of loading." It was pointed out by Mr. Roskill that Lord Wright was there dealing with stages of a voyage in relation to seaworthiness and not with the question of when loading was completed in relation to a demurrage claim. That is true, but, having regard to Lord Wright's statement: "I think that in a case like this, and "indeed, in most cases, the mere reception or dumping down of "the cargo on the ship does not involve the completion of the "loading, because I think that the operation of loading "involves all that is required to put the cargo in a condition in "which it can be carried," and to the general tenor of the statement, I feel that it can be regarded as of general application.

In the case of the loading of general cargo time is of necessity taken in placing and stowing the cargo as it arrives in the hold. Often the delivery of cargo on board a vessel is slowed down because of the difficulty of stowing certain kinds of cargo or of stowing it in a place particularly difficult of access or by reason of its structure or some obstruction. I have never heard it suggested in such a case that in assessing the time taken in loading for purposes of demurrage an apportionment should take place (on some estimated basis, for accuracy would be impossible) between time taken in stowing and time taken in bringing the goods to the hold. I can see no reason why it should be different with bulk cargo, which has to be trimmed, or, to some extent, put into bags, for the purpose of safety or for complying with enforceable regulations the object of which is safety. It cannot, I think, make any difference that the time so occupied arises from time to time in the course of loading or at the end when all the cargo is on board, or at any particular stage of the operation. It seems to me to be immaterial who has to pay the costs of the loading or whose task in the joint effort may finish first. The shipper would normally finish his work of delivering cargo to the ship before the ship receives it, and, in my view, the loading cannot be said to be completed when the shipper—here the charterer—has done all that is required of him. I will assume, without deciding, that the Canadian Water Carriage of Goods Act, 1936, is incorporated in *this* charterparty. If that is so, it provides that the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried, subject to certain limitations. The three words "load," "handle" and "stow" are used, but that does not, in my view, lead to the conclusion that stowing is not part of loading just as the handling of goods is part of the loading.

In this case I find that loading was not completed until 3 p.m. on October 17. The facts reveal that only one day, twelve hours and twenty minutes was taken in actual loading, and that the charterers were in default in not completing the loading within the lay days. To detain the vessel beyond the lay days was a breach of the contract by the charterers; *Aktieselskabet Reider* v. *Arcos, Ld.* (1). They remained in default and without any protection under the charterparty until the loading was completed. The shipowners have, therefore, established all that is necessary for them to recover demurrage under the relevant clause of the charterparty. The lay days expired at 8 a.m. on October 15. Demurrage has been admitted and paid to 8.45 a.m. on October 17. The shipowners are entitled to demurrage from then until 3 p.m., namely, 77*l.* 10*s.* The effect of this judgment is that the steamer cannot be said to be loaded until the cargo has been loaded and bagged, if required, for safety or by regulation, in the 'tween decks, and that in order to avoid demurrage the bulk wheat must be delivered in sufficient time within the lay days to allow this to be done before their expiry. That, I think, answers the first question.

In answer to the second question, I am of opinion that it makes no difference whether the vessel is already on demurrage or not. The charterparty requires that the detention shall occur "by default of the charterer or his agents," and this, I think, applies in all circumstances. If default is not proved demurrage does not accrue.

Judgment for plaintiffs.

Solicitors for owners: *Stokes & Mitcalfe.*
Solicitor for charterer: *The Treasury Solicitor.*

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(1) [1927] 1 K. B. 352.

C. A.

1948
June 4.

Tucker, Somervell and Cohen L.JJ.

DENMAN *v.* BRISE

Landlord and tenant—Rent restriction—House destroyed by enemy action—No abandonment or surrender of tenancy—House rebuilt—Refusal by landlord to admit tenant—Subsequent determination of contractual tenancy by notice to quit—Tenant's right to possession.

A house within the Rent Restriction Acts was destroyed by enemy action in 1940. The tenant accordingly ceased to occupy the premises, but there was no evidence of abandonment or surrender of the tenancy. The landlord built a new house on the site, and the tenant thereupon approached him with a view to occupying it. It was fit for occupation on February 17, 1948, but the tenant was unable to gain possession because the landlord withheld the key. The landlord then determined the contractual tenancy on April 30, 1948, by a notice to quit dated March 9. In an action by the tenant for possession,

Held, that, as there was no evidence of abandonment or surrender of the lease, and as the contractual tenancy had not been determined when the new house became fit for occupation, the tenant on that date became the lawful tenant of it and entitled, as such, to occupy it; that the tenant's claim to possession was not defeated by the principle that the Rent Restriction Acts are for the protection of tenants in possession, for his claim was not primarily made under the Acts but was simply for possession of which he had been wrongfully deprived on February 17 and to which on that date he was entitled as contractual tenant; that the landlord was not entitled to take advantage of his own wrong and invoke the Acts by setting up the tenant's lack of possession; and that, as the tenant would have been a statutory tenant in possession on expiry of the notice to quit if the landlord had not excluded him from the house, he was entitled to an order for possession.

Ellis & Sons Amalgamated Properties Ld. v. *Sisman* [1948] 1 K. B. 653 distinguished.

APPEAL from Bromley county court.

In 1940, a house, No. 18, St. Francis Close, Orpington, was let by the defendant landlord to the plaintiff tenant at a rent of 4*l*. 6*s*. 8*d*. per month. The house was destroyed completely by enemy action on September 17, 1940, the tenant accordingly ceasing to occupy the premises. In due course the landlord erected a new house on the site of the old one. The contractual tenancy continued until it was determined on April 30, 1948, by a notice to quit dated March 9, 1948. The rebuilt house was fit for occupation on February 17, 1948. On that day, after correspondence between the parties, the tenant attempted unsuccessfully to obtain the keys from the landlord, and he later brought this action.

The county court judge, having found the above facts, held that the plaintiff was a tenant on February 17, and that he had possession in the sense that he had the right to occupy, although he had no possession in the sense of the actual occupation. The judge also found as a fact that the tenant had done nothing to abandon the tenancy. He was of opinion that the landlord was wrong in excluding the tenant from the new house as long as the contractual tenancy continued, and that it was as the result of his doing so that, when the contractual tenancy expired, the tenant, although having the right of possession, was not in actual occupation. He was of opinion that it was sufficient to render a person receiving a notice to quit a statutory tenant that he should have the right and the will to occupy, even if that will was frustrated by the landlord, and he held that the tenant became a statutory tenant and was entitled to possession.

The landlord appealed.

Donald McIntyre for the landlord. This appears to be the first case on record in which it is a statutory tenant who is claiming possession of the premises. This tenant who has, throughout the period while there was no house on the site, done nothing, cannot, when he sees a new house on the point of completion on the site, come forward and claim to occupy it, saying that, despite his silence, he has all along intended to retain his legal rights. That sounds plausible in 1948, but both tenant and landlord would have regarded the giving of notice to quit the site after the house had been bombed as laughable.

[SOMERVELL L.J. I should have thought it natural for a tenant who had been bombed out to want to protect his rights.]

[TUCKER L.J. No presumption of abandonment arises on the bombing of the house. In addition, the tenancy is preserved in being by statute. Where, then, is the evidence of abandonment here ?]

The tenant's setting up another home elsewhere. There is nothing which obliges the court to hold that a periodic tenancy can only be terminated by a notice to quit. The tenant is not in possession. As a matter of law, he must be held to have abandoned the premises. That being so, he cannot simply resume possession without the landlord's consent. The only alternative view is that, as a matter of law, he has surrendered the tenancy and that the landlord has accepted the surrender.

[TUCKER L.J. Surrendering a lease is a very technical operation. What facts are relied on here as constituting a surrender ?]

The tenant's going away for six years, taking no notice of the land, and paying no rent. If the tenant is a common-law tenant of the new house, his rights in respect of it as such a tenant will terminate on expiry of the notice to quit. Unless the Rent Restriction Acts contain some provision whereby the tenant can turn out the landlord, this claim must, surely, fail. True, it is argued that the landlord's possession of the house is wrongful. It remains the case, however, that it has never yet been held that a statutory tenant is entitled to maintain an action for possession against his landlord.

[COHEN L.J. The landlord took possession before he served the notice to quit. But for his act, the tenant would have been in possession when the notice expired. Can the landlord thus take advantage of his own wrong ?]

At the very most that conduct of the landlord, if wrongful, might give the tenant some right to damages in respect of a short period of tenancy of which he has been deprived. There is nothing in the Rent Restriction Acts entitling the statutory tenant to claim possession from the landlord because he has been prevented by the landlord from exercising some right. The Acts are a shield or a defence. They are not a sword or a cause of action. The only cases with any bearing on this are *Ellis & Sons Amalgamated Property Ld.* v. *Sisman* (1) and *Simper* v. *Coombs* (2) [*Brown* v. *Brash* (3), *Hicks* v. *Scarsdale Brewery Co.* (4), and *Skinner* v. *Geary* (5) referred to.]

It is also submitted that the tenancy was frustrated by the bombing of the house, and that it is open to this court on the authorities so to hold. In that event the tenant has now no claim to the property. [*Leightons Investment Trust Ld.* v. *Cricklewood Property &c., Ld.* (6) and *Morgan* v. *Manser* (7) referred to.]

Wynn Werninck, for the tenant, was not called on.

TUCKER L.J. In my opinion, there was ample evidence on which the county court judge could arrive at all his findings

(1) [1948] 1 K. B. 653.
(2) (1948) 64 T. L. R. 131.
(3) (1948) 64 T. L. R. 266.
(4) [1924] W. N. 189.
(5) [1931] 2 K. B. 546.
(6) [1943] K. B. 493.
(7) [1948] 1 K. B. 184.

of fact. In truth, that is not quite the right approach to a judgment on appeal from the county court. It would be necessary for counsel for the landlord to establish the contrary proposition, namely, that there was no evidence on which the judge could reach any of his findings.

The correspondence shows that, although there was a complete silence during the period from the destruction of the old house in 1940 until the new house was nearing completion, as soon as the tenant became aware that the house was being built and was nearing completion he at once took steps to claim his right to occupy it. Thereafter correspondence took place and there were negotiations for the purchase of the house; but I can find no trace of any act on the part of the tenant which amounted to an abandonment of the premises, much less any facts from which the court could infer that there had been a surrender of the tenancy. Subject to the last point argued for the landlord, which I will discuss later, namely, that, as at the date of the hearing in the county court, or as at the date of the expiration of the notice to quit, the tenant was not physically in actual occupation of the premises, and, therefore, cannot claim the protection of the Rent Restriction Acts, I should have thought that this was a clear case where the contractual tenancy has subsisted throughout. There was no evidence of any abandonment, with the necessary result that, on February 17, 1948, when there was on the site a completed house fit for occupation, the tenant was the tenant of that house and entitled to occupy it. He was at that date ready and willing and anxious to occupy, but the landlord would not give him the key of the premises, and, accordingly, he was unable to obtain occupation. If he had obtained occupation, then, at the date of the expiration of the notice to quit, he would have been a tenant in physical occupation of the premises within the Rent Restriction Acts and, therefore, entitled to rely on the protection of those Acts.

The question arises whether the landlord can be heard to say that the tenant must be excluded from the protection of the Acts because he (the landlord) wrongfully prevented him from taking possession of the house and placing himself in a position in which he would be able to claim that protection. I do not think that a county court judge can be precluded from seeing that that is in fact done which should have been done. I think it quite clear, from all the authorities, which I do not think it necessary to discuss, that, broadly speaking, the proposition has long been recognized that only an occupying tenant can claim the protection of the Rent Restriction Acts. In my view, the tenant here is not primarily claiming protection under the Acts: he is claiming to be put into possession of premises of which, at the material date, February 17, he was the contractual tenant, and of which, he says, he is entitled to be in possession. It is the landlord who is really seeking to make use of the Rent Restriction Acts by saying that, because, after February 17, he gave the tenant notice to quit and the tenant was, through the landlord's own act, not the occupying tenant, he (the landlord) was entitled to claim the benefit of that notice to quit and the tenant on his own part was not entitled to claim the benefit of his tenancy. Such a position would be contrary to all ideas of justice and equity. I think that any court must have power in circumstances such as the present to order that the landlord shall restore the tenant to the position in which he should have been on the relevant date, namely, in this case, February 17, 1948. Then, the tenant having been so restored, the subsequent rights of the parties can, no doubt, be worked out in the appropriate proceedings, if necessary, in order to ascertain how they stand under the Rent Restriction Acts. That disposes of the argument for the landlord that on the facts of this case the only proper inference as a matter of law was that there had been an abandonment or a surrender, and that in any event the tenant, not having been in actual physical occupation, cannot claim the right of possession.

A further point raised was that in any event the contract of tenancy had been frustrated. I do not think that point open to the landlord in this court. In *Leightons Investment Trust Ld.* v. *Cricklewood Property and Investment Trust Ld.* (1), that very point was determined in this court. Asquith J. before whom the case came at first instance, said (2): "It is "not disputed that the doctrine of frustration has no application to an ordinary lease: *Matthey* v. *Curling* (3); *London* "*and Northern Estates* v. *Schlesinger* (4); and *Whitehall Court,* "*Ld.* v. *Ettlinger* (5); nor has it any application to a lease "of a furnished house, as was decided recently by Birkett J., "in *Swift* v. *MacBean* (6)." In this court that judgment was upheld in a short judgment of the court delivered by

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(1) [1943] K. B. 493.
(2) Ibid. 495.
(3) [1922] A. C. 180.
(4) [1916] 1 K. B. 20.
(5) [1920] 1 K. B. 680.
(6) [1942] 1 K. B. 375.

MacKinnon L.J. After stating the facts, he said (1): "In our "opinion the plaintiffs are clearly right. The doctrine of "frustration, which was first clearly enunciated in 1863 in *Taylor* "v. *Caldwell* (2), has been applied to a variety of contracts, "but it has never been applied to a demise of real property, "Indeed, there is clear authority that it cannot be so applied. "This is to be found in *London and Northern Estates Co.* v. "*Schlesinger* (3), in *Whitehall Court, Ld.* v. *Ettlinger* (4), and in "*Matthey* v. *Curling* (5). All these cases, and many others, "have recently been reviewed by Birkett J., in a careful "judgment in *Swift* v. *MacBean* (6). We do not think it "necessary to examine the question further. It is impossible "for the defendants to rely on the doctrine of frustration to "relieve them from their obligation as tenants under a demise "of land for ninety-nine years." It is true that the House of Lords (7) decided the appeal on a different point. It was held that "Even if the doctrine of frustration could apply to "a lease, the circumstances did not justify such application; "the lease had not been determined by frustration, and the "liability for rent continued." Lord Simon, in his speech said (8): "Two questions are raised by the appeal: first, can "the doctrine of frustration apply to determine a lease? "and, secondly, even if it can, are the circumstances in the "present case such as to produce the result that the lease has "been determined by frustration? If, my Lords, we all "agree (as I understand we do) that the answer to the second "question is in the negative, it is not essential in the present "case to reach a conclusion on the first question (as to which "I gather that our opinions are divided). Nevertheless, "I propose to express my opinion with regard to both "questions, since the more general issue has been much discussed and was pronounced on in the courts below, where "it was regarded as concluded by authority, including the "authority of this House, in *Matthey* v. *Curling* (5)." It is true that Lord Simon and Lord Wright then went on to express their views, which were to the effect that the doctrine of frustration could be applied to a lease and that, at any rate, *Matthey* v. *Curling* (5) was no authority to the contrary. Lord Porter expressed no view on that point, but Lord Russell of Killowen and Lord Goddard both took the contrary view.

(1) [1943] K. B. 496.
(2) (1863) 3 B. & S. 826.
(3) [1916] 1 K. B. 20.
(4) [1920] 1 K. B. 680.
(5) [1922] 1 A. C. 80.
(6) [1942] 1 K. B. 375.
(7) [1945] A. C. 221.
(8) Ibid. 227.

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In that state of authority I think that the decision of this court binds us, and that it must be for the House of Lords, at the appropriate time, to resolve this problem. Therefore the argument for the landlord based on frustration cannot succeed. I do not think it necessary to refer to the authorities which have been cited for the landlord.

Ellis & Sons Amalgamated Properties, Ld. v. *Sisman* (1), to which decision Cohen L.J. and myself were both parties, affords no assistance in the present appeal. We both adumbrated the possibility that this point might arise. I do not think that there is anything in either of our judgments which really throws any light on the problem which we have now to decide.

We have been referred to the decision of Denning J., in *Simper* v. *Coombs* (2), which shows that, unless there has been an abandonment or surrender, or something of that kind, prima facie the lease will continue in circumstances such as the present. In that case, there had been no notice to quit and the point now involved did not arise; it comes before us as a fresh point. I think that in all these cases it must always be a question of fact whether or not the tenant who has been absent from the bombed premises has acted in such a way that the court will infer that there has been something in the nature of an abandonment or surrender. In the present circumstances, I think that there was ample evidence to support the county court judge's view that there had been no abandonment, that the tenancy subsisted, and that the landlord could not now rely upon the notice to quit which had been given by him at a date subsequent to that on which he should have admitted the tenant to occupation of these premises. I think that this appeal fails.

SOMERVELL L.J. I agree. I desire to add nothing on the issues of frustration and abandonment, as I agree with everything which Tucker L.J. has said on those issues. As for the third point, on the basis that there was no abandonment or surrender, the tenant was entitled to possession of this dwelling-house on February 17, 1948, when it became habitable. He was prevented from exercising that right by the landlord. If the landlord had not prevented him he would have been in actual occupation at the time when the subsequent notice to quit expired, and could clearly have claimed protection under

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(1) [1948] 1 K. B. 653.

(2) 64 T. L. R. 131.

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the Rent Restriction Acts. The third point, therefore, as it seems to me, can be stated in this way: are the parties' rights to be determined as if the tenant had been allowed to exercise his right which the landlord prevented him from exercising, or must the position be treated on the basis that the landlord can take advantage of his own wrong and say that the tenant was never in possession or occupation, and therefore cannot claim the protection of the Act? To that question, it seems to me, there is one very clear answer: the rights of the parties must be determined on the basis that the tenant had been allowed to exercise the right which he plainly had and which the landlord prevented him from exercising.

For the reasons given by the county court judge and by my brother, I agree that the appeal should be dismissed.

Cohen L.J. I agree.

Appeal dismissed.

Solicitors for the defendant landlord: *William Sturges & Co.*
Solicitors for the plaintiff tenant: *Sandom, Kersey & Tilleards.*

R. C. C.

LANGFORD PROPERTY COMPANY LIMITED v. TUREMAN AND ANOTHER

C. A.
1948
Sept. 29.
Lord Greene M.R., Tucker and Somervell L.JJ.

Landlord and tenant—Rent restriction—Tenant of London flat also owning house in country where he resided with his family—Detained late in town by exigencies of his business—Sleeping in flat on average two nights a week—Personal occupation of flat.

There is nothing in the Rent Restriction Acts to prevent a man who has a home in one locality from having another in another locality of which he is a tenant protected by those Acts.

The owner of a cottage in the country resided there with his wife and family. His work was in London, and he took the tenancy of a London flat, where he slept, on the average, for two nights a week, arriving at any time after 9 p.m. and departing early in the morning. Very rarely did he have a meal at the flat, where a friend and the friend's wife resided as his guests. He became a statutory tenant of the flat and was sued by the landlords thereof for possession. The county court judge found that his home was his cottage in the country and, applying the observations of Scrutton L.J. in *Skinner* v. *Geary* [1931] 2 K. B. 546, held that the tenant was not residing in the flat or occupying it in the sense that it was his home and that he was not entitled to the protection of the Rent Restriction Acts. Accordingly he made an order for possession of the flat:—

Held that the county court judge had misapplied the judgment of Scrutton L.J. in *Skinner* v. *Geary* (supra), and that there was no evidence on which he could come to the conclusion that the tenant was not in personal occupation of the flat as his home.

APPEAL from the Marylebone county court.

By an agreement in writing dated October 23, 1943, the plaintiff let to the defendant Athanassoglou, a Greek merchant engaged in trade with India and the Near East, a flat, No. 12a Lancaster Close, St. Petersburgh Place, London, W.2, for one year, from February 1, 1944, and thereafter monthly at a rent of 195*l.* per annum. The flat was fully furnished by the tenant. Athanassoglou owned a cottage at Great Missenden, Bucks, where he and his wife and family had lived since 1940. He took the flat, No. 12a Lancaster Close, because he found it convenient, his business being in London, to stay the night in London occasionally and he slept at the flat, on the average, two nights a week, always occupying the same room, arriving late at any time after 9 p.m. and leaving very early the next morning. Athanassoglou said that his wife had not lived at the flat since 1943. Very rarely did he have any meal at the flat. Since the beginning of 1945, the defendant Tureman had resided at the flat with his wife.

The plaintiff company brought an action against Athanassoglou and Tureman in the Marylebone county court claiming possession of the flat on two grounds: (1.) that the defendant Athanassoglou had assigned or sub-let the flat to the defendant Tureman in breach of an undertaking not to do so in the tenancy agreement of October 23, 1943; and (2.) that on the facts of the case, neither of the defendants was entitled to the protection of the Rent Restriction Acts. It was common ground between the parties that the flat was subject to the provisions of the Rent Restriction Acts and it was admitted by counsel for both defendants that Athanassoglou had been a statutory tenant since October 1, 1945.

His Honour Judge Bensley Wells in giving judgment said that he was satisfied that the evidence of the two defendants and of Mrs. Tureman was substantially true. He found that the defendant Tureman and his wife were residing at the flat as guests of the defendant Athanassoglou, who had not assigned or sub-let the flat to Tureman and his wife or to either of

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them. The cottage at Great Missenden he found to be Athanassoglou's home. Scrutton L.J. in *Skinner* v. *Geary* (1) had said (2): " . . . . the right of the statutory tenant is a purely " personal right to occupy the house as his home " and again (3) " the principal object of the Rent Restriction Acts is to " protect a person residing in a dwelling-house from being " turned out of his home " and finally (4): " For the reasons " I have given, the Act does not in my opinion apply to protect " a tenant who is not in occupation of a house in the sense " that the house is his home, and to which, although he may " be absent for a time, he intends to return." Applying these observations of Scrutton L.J. to the present case, it was impossible to find as a fact that Athanassoglou was at any material time residing in the flat or occupying it in the sense that it was his home; nor was there any evidence that he ever intended to return to the flat to occupy it as his home, or otherwise than as a place where he might occasionally sleep as a matter of convenience. Accordingly, he held that Athanassoglou was not entitled to the protection of the Rent Restriction Acts and he made an order for possession of the flat against both defendants.

The defendants appealed.

Raymond Stock for the defendants: The county court judge misapplied the judgment of Scrutton L.J. in *Skinner* v. *Geary* (1) to the facts of this case. In *Skinner* v. *Geary* (1) the defendant did not personally occupy the house of which he was tenant which was controlled under the Rent Restriction Acts, but allowed his sister-in-law and later his sister to reside there. In this case the defendant Athanassoglou personally occupied the flat 12a Lancaster Close, since the judge found that he slept there in the same room, on the average, two nights a week. No question of animus revertendi arose, since this defendant continued in personal occupation of the flat during his tenancy. He did this, owing to the exigencies of his business in London, which kept him late at work. There is nothing in the Rent Restriction Acts which confines a man to one home. The driver of a locomotive between London and Edinburgh must have a home at either end of his journey. Scrutton L.J.

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(1) [1931] 2 K. B. 546.

(2) Ibid. 559.

(3) Ibid. 560, citing his judgment in *Haskins* v. *Lewis* as quoted by Romer L.J. [1931] 2 K. B. at p. 18.

(4) Ibid. 564.

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in *Skinner* v. *Geary* (1) showed the question at issue in that case by the words (2): "Do the Rent Restriction Acts apply "to protect a non-occupying tenant?" He then continued: "The case is not one of a tenant who spends week-ends in "a house . . . ." There was no evidence here that the defendant Athanassoglou was not in personal occupation of this flat [He was stopped.]

Heathcote-Williams for the plaintiff company: The question whether a tenant occupies premises as his home or whether he does not, is one of fact. It depends on an infinite variety of circumstances and is a question of degree. It cannot be considered as a question of law. The county court judge found that the defendant Athanassoglou merely occupied one room on the few nights he spent at the house. He arrived at any time after 9 p.m. and left early in the morning. He rarely had a meal at the flat. On these facts the county court judge found that this defendant did not occupy the flat as his home and the Court of Appeal will not disturb his finding.

LORD GREENE M.R.: I will ask TUCKER L.J. to deliver the first judgment.

TUCKER L.J.: This is an appeal from a judgment of His Honour Judge Bensley Wells given in the Marylebone county court, whereby he made an order against the two defendants in the present action, called Athanassoglou and Tureman, for possession of certain premises situate at 12a Lancaster Close, London. The plaintiff company, the landlords, relied on the decision of this court in *Skinner* v. *Geary* (1) to the effect that a tenant can only claim the protection of the Acts if he is in personal occupation of the premises.

The county court judge in his judgment, after referring to certain passages in the judgment of Scrutton L.J. in *Skinner* v. *Geary* (1) continued: "Applying these observations of "Scrutton L.J. to the present case, I was of opinion that it "was impossible to find as a fact that the defendant "Athanassoglou was at any material time residing in the flat "or occupying it in the sense that it was his home; nor was "there any evidence that he ever intended to return to the "flat to occupy it as his home, or otherwise than as a place "where he might occasionally sleep as a matter of convenience."

Turning to *Skinner* v. *Geary* (1) Scrutton L.J. said (2):

(1) [1931] 2 K. B. 546. (2) Ibid. 558.

"Parliament was dealing with a tenant who was in occupation "and who was not to be turned out; it was not dealing and "never intended to deal, with a tenant who was not in occupa- "tion but who wished to say: 'Although I am not in actual "'occupation I claim the right so long as I pay the rent to "'retain my tenancy.' If that had been put forward Parlia- "ment would have received the suggestion with contempt." Then he continues a little later (1): "Parliament, says "Mr. Safford, has not dealt with that case. In my opinion it "has not done so because it never contemplated the possibiltiy "of the tenant living somewhere else. A non-occupying tenant "was, in my opinion, never within the precincts of the Acts, "which were dealing only with an occupying tenant who had "a right to stay and not be turned out. This case is to be "decided on the principle that the Acts do not apply to a "person who is not personally occupying the house and who "has no intention of returning to it. I except, of course, such "a case as that to which I have already referred—namely, of "temporary absence, the best instance of which is that of a "sea captain who may be away for months but who intends "to return, and whose wife and family occupy the house "during his absence." At the end of his judgment (2) he said: "For the reasons I have given the Act does not in my "opinion apply to protect a tenant who is not in occupation "of a house in the sense that the house is his home and to "which, although he may be absent for a time, he intends to "return. If it were to be held otherwise odd consequences "would follow. The appellant in this case has contented "himself with living in one house and claiming another."

Mr. Heathcote-Williams for the plaintiff company submits that this is a pure question of fact and that, although we might have come to a different conclusion on the facts, we are bound by the facts as found by the learned county court judge. In my view, there was no evidence upon which the learned judge could come to the conclusion at which he arrived, namely, that this defendant Athanassoglou was not in personal occupation of this flat. The facts found by the county court judge showed that Athanassoglou habitually used the flat as a place in which to sleep when on business in London. His bona fides and truthfulness are not attacked. The fact that he has a house at Great Missenden which is also his home does not in any way prevent other premises which he may have occasion

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(1) [1931] 2 K. B. 546, 560. (2) Ibid. 564.

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to use from also being his home. In another part of his judgment in *Skinner* v. *Geary* (1) Scrutton L.J. referred to residence in a week-end cottage as being the kind of occupation which would be within the protection of the Acts. In my view, there is nothing in the Rent Restriction Acts to prevent a man having more than one home. His business may require him at different times in the week or different times in the month to be in different parts of the country, and there is nothing to prevent him having a home in those different places. I think the learned judge has misapplied the judgment of Scrutton L.J. and that, on the facts as found by him, there was really no evidence on which he could come to the conclusion that the defendant Athanassoglou was not in personal occupation of this flat. It contained his furniture; he slept there, whenever he required to do so for the purpose of his business, which was, on an average, twice a week, and his friends were residing there with his permission. Although I appreciate that there may be borderline cases, I think it is quite clear that the present case falls on that side of the dividing line which makes it amount to personal occupation by Athanassoglou. I have come to the conclusion that there was no evidence on which the learned judge could arrive at the decision at which he did arrive, and that this appeal should succeed.

THE MASTER OF THE ROLLS: I agree and do not wish to add anything.

SOMERVELL L.J.: I agree.

Appeal allowed.

Solicitors for the defendants: *Webb, Justice & Co.*
Solicitors for the plaintiff company: *Stikeman & Co.*

C. G. M.

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(1) [1931] 2 K. B. 546.

TERRITORIAL AND AUXILIARY FORCES ASSOCIATION OF THE COUNTY OF LONDON *v.* NICHOLS.

THE SAME *v.* PARKER.

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1948
June 18, 21, 24, 25; *July* 16.

Scott and Asquith L.JJ. and Romer J.

Landlord and tenant—Rent restriction—Estoppel—Unoccupied premises, owned by Territorial Association, let to member of the public—Whether letting subject to Rent Restriction Acts—Estoppel in pais—Alleged representation that premises controlled by Acts—Ambiguity in representation—Representation of law, not of fact.

The Crown is not bound by the Rent Restriction Acts, and a county territorial association is, like a Minister or an organ of the Central Government, a direct emanation from the Crown and shares its immunity from these Acts. If it is a prerequisite of enjoying that privilege that the association should not only enjoy Crown status, but in the transaction under review, be acting in pursuit of Crown purposes, a territorial association attracts Crown immunity not only in so far as it occupies land or buildings by itself or its military staff or officers but also in so far as it exercises powers granted to it by statute of leasing redundant or unused premises to members of the public. The exercise of such a power is for a Crown purpose, since it must be regarded from the point of view of the association, the lessor, as preventing its premises from running to waste, unused and unlet.

A County Territorial Association let unused premises to a member of the public on a weekly tenancy. Before the letting the landlord's agents had written to the applicants for the tenancy: "We wish to make it clear that this tenancy will only be a weekly "one and will be subject to one week's notice at any time." After the applicant had accepted the tenancy, the agents supplied him with a rent book which contained references to the Rent Restriction Acts and to the standard rent of the premises. Notice to quit having been given, the validity of which was not challenged, the tenant continued in possession of the premises. In an action for possession the tenant claimed that the Association was estopped from alleging that the premises were not controlled by reason of the representation, express or implied, to the effect that the premises were controlled, upon which representation, the tenant had acted to his detriment by not thereafter seeking other premises to occupy in lieu thereof:—

Held, that the Association was not so estopped, since (1.), having regard to the facts, the representation on which it was said that the estoppel was founded was not precise and unambiguous, and (2.) was a representation, not of fact, but of law. Accordingly two further points argued were not considered: (*a*) that an estoppel in pais was not binding on the Crown, and (*b*) that if the Rent Restriction Acts did not otherwise bind the Crown, they could not be made to do so, by way of estoppel.

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THE SAME v. PARKER.

APPEALS from Croom-Johnson J.

On December 28, 1928, the plaintiffs, the Territorial Association acquired the freehold of No. 75, Devonport Road, Hammersmith. By a written agreement dated February 11, 1941, the Association let the ground floor and basement of this house to the defendant Nichols on a weekly tenancy from February 24, 1941, at *27s. 6d.* a week. In October, 1943, the Association orally let the first and second floors of the house, also on a weekly tenancy, to the defendant Mrs. Parker. In August, 1947, both the defendants were served by the Association with notices to quit, the validity of which, as notices, was not challenged. Both the defendants continued in possession of their premises after the dates of the expiration of the notices to quit.

In Nichols' case, William Whiteley Ld. the agents of the Association on February 10, 1941, wrote to the defendant: " We wish to make it clear that this tenancy will only be a " weekly one and will be subject to one week's notice at any " time." At the hearing Nichols said in evidence that at the time he signed his tenancy agreement he was not told anything about the Rent Restriction Acts. After he had accepted the tenancy, he was given a rent book by the agents and on its inside cover there were a number of references to the Rent Restriction Acts. At the top of the page appeared the words: " Rent Notice. Part II. Rent Restrictions Regula-" tions, 1933. Notice to be inserted in every Rent Book or " similar document in respect of a house to which the Rent and " Mortgage Interest Restrictions Acts apply." This was followed by particulars of (inter alia), " The standard rent of " the premises." When giving evidence Nichols was asked in chief: " Having that book, and because of your previous " communications with Whiteleys, did you have any doubt as " to whether you were protected by the Rent Restrictions " Acts? (A.) As I said before, nobody made any reference to " me that I was occupying property other than that which is " covered by the Rent Restrictions Acts. If I had been told, " I am sure I would not have taken on the property. At that " time there were a lot of flats to be had in Hammersmith, and " if I had known of anything that has come off now, I would " not have taken on the property. (Q.) Supposing you had " been told after you had been there a few weeks that you were " not protected by the Rent Restrictions Acts, what would " you have done? (A.) I should have done the obvious thing—

" attempted to find another place. (Q.) Could you have found " other premises at that time? (A.) Definitely, I could. My " wife went to two or three." He added that he first heard a suggestion that he was not protected by the Rent Restriction Acts when he received notice to quit. In cross-examination Nichols agreed that the letter of February 10, 1941, was telling him clearly that his tenancy was only a weekly one and was subject to a week's notice at any time.

The Association sued each tenant for possession. The two cases were heard together before Croom-Johnson J., who made orders for possession. Each tenant appealed.

Pritt K.C. and *S. N. Bernstein* for the tenants: Though the Crown is not bound by a statute, unless there is express provision to that effect in the statute or it is necessarily implied, yet that proposition is subject to the exception that this is not so in the case of all statutes passed for the public good, and for the prevention of injury to the public (Com. Dig. tit. Parliament (H. 1); Bac. Abr. tit. Prerogative (E.) 5.). See note (*g*) to para. 681 of Vol. 31 of Halsbury's Laws of England (2nd edit.) tit. Statutes—operation—at pp. 521–2. The Rent Restriction Acts come within this exception. The passage in Bacon's Abridgment (7th edit.), vol. 6, at p. 462 is in these terms under the heading (5.) " Of Acts of Parliament which extend to or " bind not the king," " Herein a general rule hath been laid " down and established viz. that where an Act of Parliament " is made for the public good, the advancement of religion and " justice, and to prevent injury and wrong, the king shall be " bound by such Act, though not particularly named therein.

" But where a statute is general and thereby a prerogative " right, title or interest is devested or taken from the king, " in such case the king shall not be bound, unless the statute " is made by express words to extend to him."

An Act of Parliament cannot impose any monetary obligation on the Crown—a proposition based on the Royal Prerogative; but here there is no question of the Prerogative. The first question at issue is whether the Rent Restriction Acts apply to the Crown. When the only question is whether a certain person shall retain possession of residential property, no question arises of divesting the Crown of any prerogative right, title or interest. The court is entitled to consider that the Rent Restriction Acts were passed for the public good in that they were intended to prevent a very grave public evil. See *Gould* v. *Stuart* (1) where the Crown was held to be bound by such

(1) [1896] A. C. 575.

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a statute. In *Clark* v. *Downes* (1) and *County of London Territorial Forces Association* v. *Philpot* (2) it was assumed that the Crown was not bound by the Rent Restriction Acts. In *Wirral Estates, Ld.* v. *Shaw* (3) this point was never argued. Accordingly, the Court of Appeal is not bound to accept the Court of Appeal decisions as binding on it. The Rent Restriction Acts come within the exception stated in Bacon's Abridgment. These Acts interfere with no prerogative right of the Crown and impose no pecuniary liability on it. The Rent Restriction Acts bind the Crown.

But if they do not, and the Crown is immune from their operation, the Territorial and Auxiliary Forces Association of a county is not the Crown and does not share the Crown's immunity. The Association is a statutory body established to perform an important public function. There is no authority which shows that such a body is an "emanation" from the Crown, so as to be covered by its immunity. The Association is not a servant of the Crown in the sense that a Secretary of State is considered as a servant of the Crown. No doubt persons who could not be considered as servants of the Crown attract the advantages, privileges and immunities of the Crown when, in fact, they are doing something on behalf of the Crown. The Association in some respects might be described as acting for the Crown, but certainly not when they are letting redundant and unused houses to ordinary members of the public—the act of the Association under consideration in this case.

In the case of Nichols it is clear that the Association is estopped from affirming that they are not bound by the Rent Restriction Acts. By the references to those Acts in the rent book which the Association gave to Nichols, they represented to him clearly that the Acts applied to this letting and they so conducted the letting by their agents that Nichols as a reasonable man would and did understand that the letting was subject to the Acts, as is plain from the evidence of Nichols. There is no authority which shows that the Crown is free from an estoppel in pais. The Association, therefore, are estopped from alleging that these premises were not controlled by reason of the representation, both express and implied, made by their agents in the rent book to the effect that the premises were controlled, on which representation the defendant Nichols

(1) (1931) 145 L. T. 20.

(2) [1947] 2 All E. R. 376.

(3) [1932] 2 K. B. 247.

acted to his detriment by not thereafter seeking other premises to occupy in lieu thereof. The letter of February 10, 1941, written to Nichols by the Association's agents that they wished to make it clear "that this tenancy will only be a weekly one "and will be subject to one week's notice at any time" referred only to the contractual tenancy. A working man unless he is plainly told that he is not protected by the Rent Restriction Acts would think that he could not be dispossessed.

[Romer J.: How could they have informed him more clearly?]

By informing him plainly that this was Crown property and that his tenancy was not protected by the Rent Restriction Acts. He could then have looked for other accommodation. [*Attorney-General to H.R.H. the Prince of Wales* v. *Collom* (1) and *Plimmer* v. *City of Wellington* (2) were referred to.]

Roy Wilson for the association. The Rent Restriction Acts do not apply to these premises owned by the Territorial Association since in the first place there is clear authority that they do not apply to Crown property: *Clark* v. *Downes* (3); *Wirral Estates, Ld.* v. *Shaw* (4); *Wheeler* v. *Wirral Estates, Ld.* (5); *Rudler* v. *Franks* (6); and *Territorial Association* v. *Philpot* (7). The passage in Bacon's Abridgement cited in note (*g*) to para. 681 of vol. 31 of Halsbury's Laws of England (2nd edit.) tit. Statutes, to the effect that where an Act of Parliament is made for the public good and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein, must be regarded of doubtful authority in view of the number of Acts of Parliament passed for the public benefit and for the prevention of injury and wrong by which the Crown has been held not to be bound. The true position is stated in Maxwell's Interpretation of Statutes (9th edit.) at p. 146: "It is said that the rule does not "apply when the Act is made for the public good, the advancement of religion and justice, the prevention of fraud, or the "suppression of injury and wrong .... But it is probably more "accurate to say that the Crown is not excluded from the "operation of a statute where neither its prerogative, rights, nor "property are in question." The prerogative, rights and property of the Crown are all involved in the present case and it is also affected pecuniarily by the fact that if the tenants are

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(1) [1916] 2 K. B. 193, 203.
(2) (1884) 9 App. Cas. 699.
(3) 145 L. T. 20.
(4) [1932] 2 K. B. 247.
(5) [1935] K. B. 294.
(6) [1947] K. B. 530.
(7) [1947] 2 All E. R. 376.

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successful the Association will be compelled to find other accommodation for its instructors. Examples of cases where, although an Act of Parliament was passed for the public benefit, the Crown has been held not to be bound by it, although not specifically excluded from its operation are to be found in the following cases: *Cooper* v. *Hawkins* (1); *Gorton Local Board* v. *Prison Commissioners* (2); *Hornsey Urban District Council* v. *Hennell* (3); and *Reg.* v. *Justices of Kent* (4). The tenants relied on *Gould* v. *Stuart* (5) as being a case where the Crown was held to be bound by a statute, but in that particular case if the Crown was not bound by the Act of Parliament there was no one else who could be. That case is merely a copybook illustration of the Crown being bound by necessary implication.

Secondly, property held on behalf of and for the purposes of the Crown is in the same position as property held directly by the Crown. The basic principle is laid down in the *Mersey Docks and Harbour Board Trustees* v. *William Cameron and Others* (6) where Blackburn J. said (7): "So far the ground of "exemption" (from rates) "is perfectly intelligible, but it "has been carried a good deal farther, and applied to many "cases in which it can scarcely be said that the Sovereign or "the servants of the Sovereign are in occupation. Long "series of cases have established that where property is "occupied for the purposes of the government of the country, "including under that head the police and the administration "of justice, no one is rateable in respect of such occupation. "And this applies not only to property occupied for such "purposes by the servants of the great departments of State, "such as the Post Office, *Smith* v. *Birmingham Guardians* (8), "the Horse Guards, *Lord Amherst* v. *Lord Somers* (9), or the "Admiralty, *The Queen* v. *Stewart* (10) in all which cases the "occupiers might strictly be called the servants of the Crown; "but also to property occupied by local police, *Justices of "Lancashire* v. *Stretford* (11); to county buildings occupied for "the assizes, and for the judges' lodgings, *Hodgson* v. *Local "Board of Carlisle* (12); or occupied as a county court, *The "Queen* v. *Manchester Overseers* (13); or for a jail, *The Queen* v.

(1) [1904] 2 K. B. 164.
(2) [1904] 2 K. B. 165 (note).
(3) [1902] 2 K. B. 73.
(4) (1889) 24 Q. B. D. 181.
(5) [1896] A. C. 575.
(6) (1864) 11 H. L. C. 443.
(7) Ibid. 464.
(8) (1857) 7 E. & B. 483.
(9) (1788) 2 T. R. 372.
(10) (1857) 8 E. & B. 360.
(11) (1858) E. B. & E. 225.
(12) (1857) 8 E. & B. 116.
(13) (1854) 3 E. & B. 336.

Shepherd (1)." The test is whether the status of the person concerned is that of one who is doing what he is doing for the purposes of the Central Government. In *Wixon* v. *Thomas* (*No.* 2) (2) it was held that houses acquired by a county territorial association and used for members of the regular army who were employed as instructors were houses occupied by servants of the Crown for the purposes of the Crown and were, therefore, exempt from rateability to the poor rate. If, in the present case, the occupier of these premises had used them for the purposes of the Crown no question could have arisen as to whether the Rent Restriction Acts applied to them.

Thirdly, the property in this case was held on behalf of and for the purposes of the Crown. Section 2, sub-ss. 1 and 2 of the Territorial and Reserve Forces Act, 1907, makes it clear that the County Territorial Associations are to have transferred to them the power of His Majesty in relation to the administration of the Territorial Army. The whole scheme as disclosed by the Act is one for the administration of the territorial force by a control which is perhaps indirect, but which is far from being remote. Instead of personnel from the War Office administering the territorial force from Whitehall, the Crown sets up the County Territorial Associations which are subject to the most stringent controls on behalf of the Army Council. (See the Territorial Army Regulations, paras. 866 (3.), 905, 909, 910 and 918.) By reg. 918: "Property vested in or held by "an Association may be let or sub-let in any manner (political "meetings not excluded) consistent with the military require-"ments of the Territorial Association, and with the terms "on which the property is held, provided that—(*a*) proper "guarantees are obtained that any damage caused will be "made good by the users; (*b*) the rent charged for the use of "the property is fixed at any amount which is at least sufficient "to cover the expenses incidental to the letting, due regard "being had to the fact that, if association property is so let "or sub-let, it becomes liable to assessment for local rates "on the value of the use for other than military purposes."

Lastly, it is immaterial that the two tenants in occupation of these premises do not occupy them for Crown purposes. The Association hold them for Crown purposes and it is as much for Crown purposes to let the premises when vacant, the territorial force then being on service, to members of the public, as to house their Army instructors in them. [The article of Sir William Harrison Moore on Liability for Acts of Public Servants (1) was referred to.]

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(1) (1841) 1 Q. B. 170.

(2) [1912] 1 K. B. 690.

The Rent Restriction Acts, therefore, do not apply to these premises. In Nichols' case it is contended that the Association are estopped from putting forward this proposition. It is submitted for the Association (1.) that there are none of the elements of estoppel in this case; (2.) the proposition, as a statement of law, that the Rent Restriction Acts, if they do not otherwise apply to these premises can be made to apply to them by way of an estoppel is unsound; and (3.) that the Crown is not bound by an estoppel in pais. The classical statement of such an estoppel was given by Brett J. in *Carr* v. *London and North Western Ry. Co.* (2): "If a man by his "words or conduct wilfully endeavours to cause another to "believe in a certain state of things, which the first knows to "be false, and if the second believes in such state of things, "and acts upon his belief, he who knowingly made the false "statement is estopped from averring afterwards that such a "state of things did not in fact exist." This statement of the conditions of an estoppel in pais will be found in Taylor on Evidence (12th edit.) at p. 100. A party relying on the estoppel must prove conduct amounting to a representation by the other party; the representation must be of a state of things in fact—not a representation of law; the representation must have induced the party relying on the representation to act in a certain way which must be to his detriment. Can it be said that the issue of a rent book containing references to standard rent is an unambiguous representation wilfully made, since all lettings of this kind require a rent book? The representation alleged is one of law—that these premises were controlled under the Rent Restriction Acts and not one of fact. Lastly, does the evidence show that Nichols acted to his detriment? [He was stopped.]

Pritt K.C. in reply. On the issue as to estoppel, the representation to Nichols that these premises were controlled and therefore safe to take and to continue in as a residence was vital to him. The fear of being ejected from a dwelling-house to a rest or workhouse is one of the nightmares of working-class life. If Nichols had been told that the premises were not controlled by the Acts, he would have, at once, sought another dwelling-house controlled by the Acts, as appears from the evidence. By s. 6, sub-s. 1, of the Increase of Rent

(1) (1907) 23 L.Q. Rev. 12.

(2) L. R. 10 C. P. 307, 316.

and Mortgage Interest (Restrictions) Act, 1938: "Where the "rent of a dwelling-house to which the principal Acts apply "is payable weekly" it is the duty of the landlord to provide a rent-book. If all rent-books to be purchased now contain references to the standard rent, these and other particulars which represented that the premises were controlled should have been crossed out. The representation made was one of fact —that the facts were such that the premises were controlled. In many statements of fact a question or questions of law are involved: that a person is a married woman, that goods are uncustomed, that a building is a public house and that a man is a voter. If it is said that one cannot make a statute apply by estoppel, I answer: why not, since there is neither authority nor principle in support of that negative proposition? See *J. & F. Stone Lighting and Radio, Ld.* v. *Levitt* (1).

To return to the main point, whether the Rent Restriction Acts applied to these premises, on the issue whether those Acts apply to Crown property, if the cases cited are examined it will seem that the court was looking to see whether the Crown was bound by necessary implication. The real significance of the decisions was that the regulation material to the issue, and the conditions, were such that the necessary implication was in that case that the Crown was not bound by that statute. See especially *Gorton Local Board and Prison Commissioners* (2). In *The Queen* v. *Justices of Kent* (3) the court was moved by the consequence of a contrary construction. In these cases the court on examination held that the Crown was not bound, because in the context it could not have been intended that the Crown should be bound or because the prerogative was invaded or because there was a pecuniary obligation imposed on the Crown. See for instance the observations of Lord Alverstone C.J. in *Hornsey Urban District Council* v. *Hennell* (4).

Counsel for the Association contended that property held on behalf of and for the purposes of the Crown was in the same position as property held directly by the Crown. The cases he cited were rating cases and he rested his case on the *Mersey Docks and Harbour Board Trustees* v. *William Cameron and Others* (5). But in rating cases occupation in the test and

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(1) [1947] A. C. 209.
(2) [1904] 2 K. B. 165.
(3) 24 Q. B. D. 181.
(4) [1902] 2 K. B. 73, 80.
(5) 11 H. L. C. 443.

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liability to rates is not here the criterion. In any case, these premises were in the occupation of the two tenants and so became liable to rates. What exactly is the Crown? There is much confusion shown in the answer to this question. See Sir William Harrison Moore's article on Liability for Acts of Public Servants (1). What is clear is that a Territorial Association is not the Crown and though it may perform functions on behalf of the Crown, it is not doing so when it lets rooms to members of the public. See Wade and Phillips' Constitutional Law (3rd edit.) at p. 263 under the heading: "What is the Crown."

Cur. adv. vult.

July 16. Scott L.J. These two cases were heard together, and the judgment of the court that I am now going to read is in both cases. The main point raised in the two appeals is identical, but the appellant Nichols relies in addition on a ground of appeal (namely, estoppel) not open to the defendant Mrs. Parker. This main point raises three questions: (*a*) whether the Crown is or is not bound by the Rent Restriction Acts; (*b*) if it is not, whether the immunity of the Crown extends to entities so related to the Crown as is a Territorial Association; (*c*) and if so, whether it so extends, for purposes which include the two lettings involved in the present case. If this Territorial Association had been an ordinary lessor there would have been no ground for making (and indeed no jurisdiction to make) an order for possession. The notices to quit would merely have operated to constitute the defendants statutory, as opposed to contractual, tenants. If, however, the Association is "the Crown," or a body invested with the Crown's relevant immunities, and if these exclude the operation of the Rent Restriction Acts, the notices to quit are effective, the defendants have no answer to the claim, and the judgment a quo must be affirmed.

As regards the first question: "Is the Crown bound by the Rent Restriction Acts?" we entertain no doubt but that the general answer (leaving aside questions as to who or what is to be taken to be "the Crown") is "No." There are five direct authorities on the point all giving the same answer, two of them being decisions of this court and binding on it: *Clark* v. *Downes* (Divisional Court) (2); *Wirral Estates, Ld.* v. *Shaw*

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(1) 23 L. Q. Rev. 12.

(2) 145 L. T. 20.

(Court of Appeal) (1); *Wheeler* v. *Wirral Estates, Ld.* (Court of Appeal) (2); *Rudler* v. *Franks* (Divisional Court) (3); and *County of London Territorial Forces Association* v. *Philpot* (a decision of a court of first instance) (4). It is quite true that in the Court of Appeal decisions the point was in some degree assumed, certainly not elaborately contested; but authorities were cited (as appears from the summary of the argument in *Wirral Estates, Ld.* v. *Shaw* (5)) and the court clearly decided that the Crown was not bound. Mr. Pritt for the tenants contended notwithstanding these specific and binding decisions on the actual statutes involved in the present case that, while in general the Crown was not bound by a statute except by express provision therein or necessary implication, yet this rule was subject to an exception in the case of all statutes passed " for the " public good "; and that the Rent Restriction Acts were of this character. For this proposition he relied on a passage in Bacon's Abridgment, cited in Halsbury's Laws of England, vol. 31, pp. 521–522, footnote (*g*). We do not know what precise meaning attached to the words " for the public good " when Bacon's Abridgment was published. Possibly the words had a meaning narrower than would attach to them to-day. It is difficult to suppose at the present day that any public statute is not in theory at least directed to the welfare of the public; and Mr. Pritt's argument on this point, if accepted, would compel us to say that such statutes as the Income Tax Act, 1842, and the Public Health Acts (none of which are binding on the Crown) are not for the public benefit. But if the ancient rule ever had in fact the wide meaning claimed for it, we can only conclude that it has been " eaten away " by exceptions. In any case we are precluded from giving effect to that wide meaning in the particular case of the Rent Restriction Acts, by decisions which, as indicated above, bind us.

Accordingly, we have to consider next whether, assuming the Crown is immune from the operation of the Rent Restriction Acts, the plaintiff Territorial Association enjoys that immunity in respect of the tenancies involved in these appeals. Such an inquiry logically falls into two parts: (I.) Is the Territorial Association a sufficiently intimate " emanation " from the Crown to attract the contagion of the Crown's

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(1) [1932] 2 K. B. 247.
(2) [1935] 1 K. B. 294.
(3) [1947] K. B. 530.
(4) [1947] 2 All E. R. 376.
(5) [1932] 2 K. B. 252.

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immunity; (2.) if so, can it claim that immunity in respect of these particular transactions, namely, leases of property owned by the Territorial Association to ordinary, non-military tenants. These questions, though logically distinct, in practice tend to coalesce in the sense that the answer to both depends to a great extent on the provisions of the Territorial and Reserve Forces Act, 1907, which not only affect the status of Territorial Associations, but the specific transactions in which they must, or may lawfully, engage. To these provisions accordingly we next advert. The material provisions are in the main the following: s. 1, sub-ss. 1, 2 and 3 (*b*); s. 2, sub-ss. 1, 2 (*a*) and (*c*); s. 3, sub-s. 1; and s. 4, sub-s. 1 (*b*). (I treat those sections as read). Under s. 4, which empowers the Army Council to make regulations, a number of regulations were made, of which the most important for the present purpose is Reg. 918 of the 1936 Regulations. This reads as follows: "Property vested in or held by an Association may be let or "sub-let in any manner (political meetings not excluded) "consistent with the military requirements of the Territorial "Association, and with the terms on which the property is "held, provided that—" (*a*) proper guarantees are obtained "that any damage caused will be made good by the users; "(*b*) the rent charged for the use of the property is fixed at "an amount which is at least sufficient to cover the expenses "incidental to the letting, due regard being had to the fact "that, if Association property is so let or sub-let, it becomes "liable to assessment for local rates on the value of the use for "other than military purposes." It seems to us to emerge clearly from a conspectus of these provisions: (1.) that the Army Council and the Secretary of State for War, who is its head and mouthpiece, are direct emanations from the Crown, that they share its privilege of immunity from the operation of statutes except in so far as the contrary intention appears expressly or by necessary implication from the terms of the statute or statutes in question, and that the contrary intention does not appear in the Rent Restriction Acts: hence a lease granted by the Army Council itself would not be a lease to which those Acts apply; (2.) that under the Territorial and Reserve Forces Act, 1907, certain administrative functions of the Crown are transferred to the Territorial Associations; (3.) that these functions are to be exercised by such Associations under the strictest control and supervision by the Army Council; (4.) that one of such functions is that of holding land and letting it (when not usable or being used for direct military purposes) to ordinary members of the public.

What light do these considerations throw on the two logically distinct but interlocked questions which we have formulated above? (*a*) As regards status, we are of opinion that a Territorial Association is, like a Minister or organ of the Central Government, a direct emanation from the Crown; and not in this respect comparable with the Local Government authorities. These last do not in general attract the relevant Crown privilege in respect of statutes, though they do so in exceptional cases, where they fulfil functions which, though chargeable on the local rates, are of nation-wide scope and import, for example the provisions of buildings (such as judge's lodgings and assize courts) for the administration of justice. We think that the function of helping to raise a Territorial Army is typically a function of this order, (the King is the fountain of justice and the head of the Armed Forces), and contrasts sharply with functions, semi-commercial and discharged previously by private commercial bodies, such as are vested in public corporations like the Mersey Docks Board, and were held by the House of Lords, accordingly, in *Mersey Docks and Harbour Board Trustees* v. *William Cameron and Others* (1) not to exempt that body from rates. This matter is discussed at length in an article by the late Sir William Harrison Moore in 23 Law Quarterly Review, page 12 et seq. The article acknowledges and illustrates the obscurity of the question who, for purposes such as the present, is to be treated as the Crown or as a body "around which the Crown's shield is "thrown." We are, however, clearly of opinion that a Territorial Association falls on the "privileged" side of a line which cannot be precisely drawn. (*b*) If it is a prerequisite of enjoying the privilege that the body concerned should not only enjoy Crown status but, in the transaction under review, be acting in the pursuit of Crown purposes, we are of opinion that Territorial Associations attract Crown immunity not only in so far as they occupy land or buildings, by themselves or their military staff or officers, but also in so far as they exercise the powers (granted them by the present statute) of leasing redundant or unused premises to members of the public. This, in our decided view, is a "Crown purpose." The relevant "purpose," in our view, is that of the Territorial Association as lessor, not that of the unofficial lessee. To the lessee no doubt nothing matters except that he is getting somewhere to live: that is his "purpose," and to him it is a matter of indifference why, how or from whom he comes to obtain his lease. The purpose of the lessor Association, on the other hand, is, if and when and so far as premises at its disposal are not needed for the occupation of Armed Forces, but may in time be needed for that purpose again, to ensure, in pursuance of the powers and duties conferred and imposed on it by the Act, that in the interim such premises do not run to waste unused and unlet; but rather that they shall be economized and exploited for the benefit of the public and the Exchequer.

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(1) 11 H. L. C. 443.

Much confusion is caused in this matter by importing liability to rates as a relevant criterion. In rating, occupation is the test. So long as the Crown occupies premises by its servants, those servants do not themselves occupy, and are therefore not rateable; and the Crown itself, on whose behalf they are there, is immune from rates. So soon, however, as the Crown lets to an independent occupier, that occupier becomes rateable, because he occupies. Regulation 918 is careful to affirm this position as to rateability when the Territorial Association lets to a private individual. This circumstance has, in our view, no bearing whatever on the problem presented by the present appeals. To say that if the Association lets premises acquired and held by it for Crown purposes to X., and X. thereby becomes rateable, it follows that the Association ceases to hold the premises for Crown purposes, is a non sequitur. Our conclusion, therefore, on this the main point in the appeal, is that the plaintiff Association is not bound by the Rent Restriction Acts in respect of the material leases and is not precluded by those Acts from asserting its claim to possession.

In the case against Nichols, however, a further point is relied on by that tenant, founded on estoppel. In the amended particulars the point is pleaded as follows: "The plaintiffs are "estopped from alleging that the premises are not controlled "premises by reason of the representation, express or implied, "made by their agents in two rent books to the effect that the "premises were controlled premises, upon which representation "the defendant acted to his detriment by not thereafter "seeking other premises to occupy in lieu thereof." The agents referred to were William Whiteley, Ld., who negotiated this and other lettings on behalf of the Association.

[His Lordship then stated the evidence on this issue set out earlier in this report.] On the evidence it was contended

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on Nichols' behalf that the entries in the rent book constituted an unambiguous representation of fact, namely, that the premises were within the Rent Restriction Acts; that this defendant acted on this representation to his detriment; that an estoppel in pais thereby arose; and that such an estoppel is binding on the Crown. Croom-Johnson J., in delivering judgment in this case, referred to the well-known passages on the subject of estoppel contained in the judgment of Brett J., in *Carr* v. *London and North Western Ry. Co.* (1), and we need not repeat them. Lord Cranworth expressed himself in similar terms in *West* v. *Jones* (2) as follows: "Where a party "has, by words, or by conduct, made a representation to "another leading him to believe in the existence of a particular "fact or state of facts, and that other person has acted on "the faith of such representation, then the party who made "the representation shall not afterwards be heard to say that "the facts were not as he represented them to be."

Apart altogether from the fact that Nichols gave no very clear evidence proving that but for the statements in the rent book he would have gone to other premises, we think that this plea of estoppel must fail. In the first place, we think that the letter written to Nichols by Messrs. William Whiteley, Ld., on February 10, 1941, is tolerably clear in its terms and must have conveyed to his mind the fact that he could at any time be dispossessed on one week's notice. If, as was suggested by Mr. Pritt, the letter must be taken to have been confined to the proposed contractual position alone and to have left open the implication that, if the notice were given, Nichols would remain on as a statutory tenant, then there was no very apparent object, from the point of view of William Whiteley, Ld., in writing the letter at all. Regarding the letter from a practical point of view we think that there is no reasonable doubt but that Nichols signed his tenancy agreement and went into possession in the belief that the tenancy could be brought to an end by a week's notice and that in such event he would have to leave. But if, believing this, he was willing to take the tenancy, how can it be said that but for the contrary belief, induced a few days later by the rent book, he would have sought other premises elsewhere? Moreover, in any case, the alleged representation in the rent book cannot be isolated from the information conveyed to the defendant by this letter and if the two be read together such a measure

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(1) L. R. 10 C. P. 307.

(2) (1851) 1 Sim. (N. S.) 205, 207.

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of ambiguity is introduced into the representation as is fatal to the defendant; for it is well settled that representations, in order to operate as estoppels, must be free from ambiguity in their terms. "An estoppel," said Bowen L.J., in *Low* v. *Bouverie* (1) "that is to say, the language upon which the "estoppel is founded, must be precise and unambiguous."

A further ground on which, in our view, the plea of estoppel must fail is that the statements in the rent book, if amounting to a representation at all, constitute a representation of law, and not of fact. The view advanced on behalf of the defendant Nichols was that the statements represented that the premises which were the subject of his tenancy were within the Rent Restriction Acts; in other words that they were controlled premises. That is not a representation of fact; it is a statement of the result obtained by applying the provisions of the Acts to the circumstances of the particular case. It is no easy matter sometimes, as the many decided cases on the subject show, to say whether premises are or are not within the Acts, and a statement to the one effect or the other cannot, in our judgment, be fairly regarded other than as a representation of law.

For the above reasons we are clearly of opinion that the defendant Nichols' plea of estoppel has not been established; and it is unnecessary for us to consider whether it fails for the further reasons which were argued by counsel for the Association, namely: (*a*) that estoppel in pais is not binding on the Crown, and (*b*) that if the Rent Restriction Acts do not otherwise bind the Crown, they cannot be made to do so by the operation of the principle of estoppel. In our judgment both appeals fail and must be dismissed with costs.

Appeals dismissed.

Solicitor for the tenants: *Ralph J. Myers.*
Solicitors for the Territorial Association: *Fladgate & Co.*

C. G. M.

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(1) [1891] 3 Ch. 82, 106.

BAIN *v.* MOSS HUTCHISON LINE, LIMITED.

1948
June 29.

Birkett J.

Evidence—Fire in ship—Action against owners for negligence—Statements by master and officers—" Person interested "—Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1, *sub-s.* 3.

The servant of a company, defendants to an action for negligence, may be a " person interested " within the meaning of s. 1, sub-s. 3, of the Evidence Act, 1938, although he is not financially interested in the result of the action.

ACTION.

On the night of August 18, 1945, there was a fire in the saloon of the steamship *Esneh.* Alexander Bain, the purser, was trapped in his cabin next to the saloon and died in consequence of the fire. The plaintiff, his widow, brought this action for negligence against the defendants, the owners of the *Esneh.* She sued both as the administratrix of the deceased and under the Fatal Accidents Act, 1846. She alleged that the defendants were negligent (i.) in exposing the deceased to undue risk, (ii.) in not providing proper fire-fighting appliances and (iii.) in failing to provide a safe and proper system of work. As regards (iii.) the plaintiff alleged that the night watchman was not properly instructed in his duties, that there was no proper system of fire alarms and that there had been no fire drills over a long period. The defendants denied that they were negligent in any respect.

Gradwell for the plaintiff.

Berryman K.C. and *H. Salter Nichols* for the defendants applied for an order that statements made by the master and the second and third officers of the *Esneh* in the form of signed proofs should be admitted in evidence under s. 1, sub-s. 2 of the Evidence Act, 1938 (1). Those witnesses were beyond the seas and it was not reasonably practicable to call them. Their statements would tend to establish facts which were in issue.

Gradwell objected that the statements were inadmissible under s. 1, sub-s. 3. The statements were made after the issue of the writ by persons interested in the result of the proceedings.

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(1) Evidence Act, 1938, s. 1, sub-s. 3: " Nothing in this section " shall render admissible as evi- " dence any statement made by a " person interested at a time when " proceedings were pending or " anticipated involving a dispute, " as to any fact which the state- " ment might tend to establish."

[*Plomien Fuel Economiser Co., Ld.* v. *National Marketing Co.* (1); *Friend* v. *Wallman* (2); *The Atlantic and The Baltyk* (3) and *Holton* v. *Holton* (4) were referred to.]

BIRKETT J. It is said that the master and second and third officers had personal knowledge of the matters to which they refer in their statements and that they cannot be called either because they are beyond the seas, or because it is not reasonably practicable to call them, and I will assume those propositions to be established. Furthermore it is reasonable to assume that those statements would establish a fact or facts about the fire buckets and fire appliances on board the *Esneh* which have been and are in dispute. But it is clear that these three statements were made after the issue of the writ in this action and while proceedings were pending. Therefore the point I have to decide is whether the master and the second and third officers are " persons interested " within the meaning of sub-s. 3 of s. 1 of the Evidence Act, 1938.

It is manifest that the allegations which are made on behalf of the plaintiff would not, if established, reflect very favourably upon those who were in charge of this ship. It is agreed by counsel that the meaning of " persons interested " in sub-s. 3 has only been considered by the Court of Appeal in *Friend* v. *Wallman* (2) in which they held that statements made by two United States' soldiers who witnessed a collision between a bicycle and a motor car should be admitted in evidence. That case dealt with a number of points under the Evidence Act with which I am not concerned but they held incidentally that the two soldiers were not persons interested. Somervell L.J., delivering the judgment of the court, said (5): " [Counsel] " also submitted that the soldiers were ' interested persons ' " within s. 1, sub-s. 3. We can find no evidence of this. " ' Interested ' clearly means personally interested in the " result of the proceedings." I must follow that decision, and I must determine therefore whether the three men in the present case were personally interested.

The view which has been suggested that the words must be limited to financial interest is one that I would find difficulty in accepting. Morton J. said in *Plomien Fuel Economiser Co., Ld.* v. *National Marketing Co.* (6): " It may be that

(1) [1941] Ch. 248.
(2) [1946] K. B. 493.
(3) (1946) 62 T. L. R. 461.
(4) [1946] 2 All E. R. 534.
(5) [1946] K. B. 500.
(6) [1941] Ch. 248, 251.

"there are circumstances in which it might be said that "a servant of the company was not 'a person interested.' "As to that, I express no opinion; but I think that the "general intention of the section is that, if there is put in "evidence a statement to which, of course, no cross-examination can be directed"—the absence of cross-examination is an important matter—"it should be either one made at a time "when proceedings 'involving a dispute as to any fact which "'the statement might tend to establish' are not 'pending or "'anticipated,'"—as they were in the present case—"or one "made by what I may conveniently describe as an independent person"—that is, a person not personally interested, in the sense that the Court of Appeal has laid down. In *The Atlantic and The Baltyk* (1) there was a collision between two ships and certain statements had been made before a notary public in New York about a month after the collision had taken place by the master, two engineers and the look-out man of one of the ships involved. Objection was taken and Bucknill L.J. sitting as additional judge of the Probate, Divorce and Admiralty Division ruled that the statements made by the two engineers and the look-out man were admissible, under sub-ss. 2 and 3 of s. 1 of the Evidence Act, 1938, on the ground that they were not made by interested persons, and that undue expense and delay would otherwise be caused. With regard to the master, he ruled that at the time when the master made the statement he was a person interested because he might be personally liable. In *Holton* v. *Holton* (2) Mr. Clifford Mortimer asked Barnard J. to admit a statement by the mother of a petitioner in a divorce suit, her interest being only of a family or sentimental character. Mr. Mortimer said in argument (3): "Those words ['person "'interested'] must mean a person who has a pecuniary or "other material interest in the result of the proceedings— "a person whose interest is affected by the result of the "proceedings,"—I suppose that is what he means by "material"—"and [who,] therefore, would have a temptation "to pervert the truth . . . . It does not mean an interest "in the sense of intellectual observation or an interest purely "due to sympathy. It means an interest in the legal sense, "which imports something to be gained or lost." Barnard J. so far acceded to that view as to admit the statement, but he gave no detailed reasons for so doing.

(1) 62 T. L. R. 461.
(2) [1946] 2 All E. R. 534.
(3) Ibid. 535.

The only other matter to which I need refer is the Merchant Shipping Act, 1894, dealing with the question of the certificates of masters, mates and engineers. By s. 470, sub-s. 1: "The "certificate of a master, mate, or engineer may be cancelled "or suspended (*a*) by a court holding a formal investigation "into a shipping casualty under this Part of this Act, or by "a naval court constituted under this Act, if the court find "that the loss or abandonment of, or serious damage to, any "ship, or loss of life, has been caused by his wrongful act or "default . . . . (*b*) by a court holding an inquiry under this "Part of this Act into the conduct of a master, mate, or "engineer, if they find that he is incompetent, or has been "guilty of any gross act of misconduct, drunkenness, or "tyranny, or that in a case of collision he has failed to render "such assistance . . . ."

Considering all the facts before me I think that the master and second officer and third officer of the ship were personally interested in the result of this action. Although it is manifest that these three men had no financial or pecuniary interest, in the direct sense, at all, I think that they are persons who are personally interested in the result of this action because of its nature and because of the allegations made. Therefore, I shall not admit any of the three statements.

Evidence rejected.

Solicitors for the plaintiff: *Field, Roscoe & Co., for Neville, Piercy & Co., Liverpool.*

Solicitors for the defendants: *Botterell & Roche.*

R. P. C.

Reversed. H.L. [1950] 1 All E.R. 392.

C. A.

1948

May 25, 26;
July 9.

Scott, Asquith and Bucknill L.JJ.

BARKWAY *v.* SOUTH WALES TRANSPORT CO., LD.

Evidence—Two actions for negligence against company in respect of same accident—Witness in first action dies—Transcript of his evidence in first action not admissible in second action—"Person "interested"—Employee of defendant company—Part of transcript put to a witness in cross-examination—Whether whole must be read—Evidence Act, 1938 (1 & 2 *Geo.* 6, *c.* 28), *s.* 1, *sub-ss.* 1 (i.) (*b*), 3 *and* 4.

The tyre of an omnibus burst and an accident followed in which a number of passengers were killed or injured. J, a tyre-tester employed by the omnibus company, gave evidence for them in an action for negligence brought against them by an injured passenger. Later the widow of a passenger killed in the accident brought a second action for negligence against the company in respect of her husband's death, but meanwhile J had died.

Counsel for the widow in that action put views expressed by J in the first action to a witness in cross-examination but neither side applied for the transcript of J's evidence in the first action to be admitted in evidence at the trial of the second action. Judgment was given for the widow and the company appealed Counsel for the company applied in that appeal for the transcript of J's evidence in the first action to be admitted in evidence :—

Held, (i.) that the person who " made " the transcript within the meaning of s. 1, sub-s. 1, of the Evidence Act, 1938, was the shorthand-writer, because he satisfied the conditions of sub-s. 4, and not J, who did not satisfy those conditions ; (ii.) that J's evidence was not " information supplied to " the shorthand-writer within the meaning of sub s. 1 (i.) (*b*) of s. 1 ; and (iii.) that the transcript was therefore not admissible in evidence under that section.

Edmonds v. *Edmonds* [1947] P. 67 distinguished.

Held, also (i.) that J was " interested " within the meaning of sub-s. 3 of s. 1 in that (*a*) his reputation as a tyre-tester was involved, and (*b*) he was interested as an employee in his employers winning the case ; (ii.) that the transcript was " made by a person " interested " within the meaning of that sub-section, although the shorthand-writer was not interested, because J was interested ; and (iii.) that the transcript was therefore also inadmissible under sub-s. 3.

Held, also that the fact that in the second action the widow's counsel put views expressed by J in the first action to a witness in cross-examination did not make the transcript admissible by reason of the rule that where part of a document is read by one side the whole of its text must, if the other side insist, also be read.

APPEAL from Sellers J.

On February 27, 1943, a double-decked omnibus belonging to the defendants left the road and turned on its side. The accident was caused by a tyre-burst due to an impact fracture suffered by the tyre on an earlier occasion. The fracture would not have been revealed on a superficial examination. There were fifty-three passengers on the omnibus. Four were killed and others were injured.

Later in 1943 one of the injured passengers brought an action for negligence against the defendants (hereinafter called " the first action ") and one Jenkins, a tyre-tester and fitter employed by the defendants, gave evidence on their behalf.

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Lewis J. who tried the first action, found that the defendants had not been negligent and gave judgment in their favour.

Meanwhile the widow of George Morgan Barkway, who was one of the four passengers killed in the accident, brought another action against the defendants for negligence (hereinafter called "the second action") but before that action came to be tried the witness Jenkins had died. At the trial of the second action before Sellers J. views expressed by Jenkins in the first action were put to a witness in cross-examination by counsel for the plaintiff, but no application was made by counsel on either side to admit as evidence in the second action the transcript of Jenkins' evidence in the first action. Sellers J. found that the defendants had been negligent and awarded 2,000*l.* damages to the plaintiff. The defendants appealed.

Fox-Andrews K.C. and *Gerwyn Thomas* for the defendants applied in the course of the hearing of the appeal that the transcript of Jenkins' evidence in the first action should be admitted as evidence in the appeal. The transcript of Jenkins' evidence in the first action was admissible in evidence in the second action, and is therefore admissible in evidence in the present appeal. The court, in the exercise of its discretion, should accept the record of the evidence of such a person in the present circumstances. If evidence, otherwise admissible in the present case, were contained in an affidavit sworn in connexion with another case the court would have the right to look at it. It follows that the court should be entitled to look at the written record of the evidence of a witness in another case, where it is material.

[BUCKNILL L.J. The court has no discretion to admit evidence. Either it is admissible or it is not.]

The words of R. S. C. Or. 32, r. 2, sub-r. 3, which provide that where one party has called upon another to admit any document, and that other gives notice of non-admission, the costs of proving the document shall be paid by that other unless "the court or a judge shall certify that there were "reasonable grounds for not admitting the authenticity of "the document" show that a court has a discretion in the matter. Similar wording is to be found in Or. 32, r. 4.

Jenkins' evidence in the first action is admissible under s. 1

of the Evidence Act, 1938 (1) as a statement "made by a "person in a document and tending to establish" a fact of which direct oral evidence would be admissible. It is difficult to contend that the transcript is a document made by the witness Jenkins, but it is clearly a document made by the shorthand-writer. The shorthand-writer made the statement "in the performance of a duty to record information supplied "to him" as required by sub-s. 1 (i.) (*b*) of s. 1; *Edmonds* v. *Edmonds* (2), *Bullock* v. *Borrett* (3). As regards sub-s. 3 "person "interested" in that sub-section refers to the person who made the document referred to in sub-s. 1. That person was the shorthand-writer, and he was not a "person interested."

At the trial of the second action counsel for the plaintiff cross-examined one of the witnesses of the defendants about Jenkins' evidence in the first action. That fact should be deemed to have brought in the whole of Jenkins' evidence. As counsel sought to ascertain part of that evidence it is right and just that the whole of that evidence should be produced. The rule is that where part of a document is read by one side the whole of its text must, if the other side so insist, also be read, and that rule applies here.

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(1) The Evidence Act, 1938, s. 1, sub-s. 1: "In any civil proceedings where direct oral "evidence of a fact would be "admissible, any statement made "by a person in a document and "tending to establish that fact "shall, on production of the "original document, be admissible "as evidence of that fact if the "following conditions are satisfied, that is to say—

"(i.) if the maker of the statement either—

"(*a*) had personal knowledge of "the matters dealt with by the "statement; or

"(*b*) where the document in "question is or forms part of a "record purporting to be a continuous record, made the statement (in so far as the matters "dealt with thereby are not "within his personal knowedge) "in the performance of a duty to "record information supplied to "him by a person who had, or "might reasonably be supposed "to have, personal knowledge of "those matters . . . .

Sub-section 3: "Nothing in this "section shall render admissible as "evidence any statement made "by a person interested at a "time when proceedings were "pending or anticipated involving "a dispute as to any fact which "the statement might tend to "establish.

Sub-section 4: "For the "purposes of this section, a statement in a document shall not be "deemed to have been made by a "person unless the document or "the material part thereof was "written made or produced by "him with his own hand, or was "signed or initialled by him or "otherwise recognized by him in "writing as one for the accuracy "of which he is responsible."

(2) [1947] P. 67.

(3) [1939] W. N. 49; 55 T. L. R. 408.

H. Edmund Davies K.C., *Platts-Mills* and *Stephen Phillips* for the plaintiff. The evidence of the witness Jenkins was not "information supplied to" the shorthand-writer in the first action within the meaning of the Evidence Act, 1938, s. 1, sub-s. 1 (i.) (*b*). It was information supplied to the court. *Edmonds* v. *Edmonds* (1) is distinguishable because there the information was supplied to a commissioner, and it was he who transcribed and signed it. In *Bullock* v. *Borrett* (2) evidence taken down by a justices' clerk was admitted by the mutual consent of the parties and the question of its admissibility under s. 1, sub-s. 1 (i.) (*b*) did not therefore directly arise. Nor was the transcript of Jenkins' evidence "made" by the shorthand-writer within the meaning of s. 1. He neither signed nor initialled it nor otherwise recognized it in writing within sub-s. 4. Furthermore the transcript of Jenkins' evidence in the first action is rendered inadmissible in the second action, and in the present appeal, by sub-s. 3 of s. 1, because Jenkins was a "person interested" within the meaning of that sub-section. He was interested both because his reputation as a tyre-tester was at stake, and because he was an employee of the defendants; *Plomien Fuel Economiser Co., Ld.* v. *National Marketing Co.* (3).

The transcript is not admissible in evidence in the present appeal on the ground that if part of a document is read by one side the whole of the text of it must, if the other side insist, also be read. Views expressed by Jenkins were admittedly put to a witness in cross-examination in the second action, but no objection was taken to that cross-examination at the time, and no application was then made that the whole of the transcript of Jenkins' evidence should be read.

SCOTT L.J. said that the court did not desire to hear further argument on the evidence point, that they refused to admit the transcript of Jenkins' evidence in the first action as evidence in the appeal in the second action, and that they would give the reasons for their decision after the hearing of the appeal had been closed.

Cur. adv. vult.

July 9. ASQUITH L.J. gave judgment accordingly, with which SCOTT L.J. and BUCKNILL L.J. agreed. Counsel for the

(1) [1947] P. 67.
(2) [1939] W. N. 49; 55 T. L. R. 408.
(3) [1941] Ch. 248.

defendants pressed the court to admit in evidence the transcript of the evidence given by Jenkins in the first action. He based his application on two grounds, of which the chief was that the testimony was made admissible in the present case by s. 1 of the Evidence Act, 1938.

He had first to establish that the testimony that he sought to have admitted was a "statement made by a person in a "document" within sub-s. 1 of s. 1. Who is the "the "person" and what is the "document" in this case? The "document" can only be the transcript of the evidence. The "person" must be either (*a*) the dead man, Jenkins, or (*b*) the maker of the typed transcript of the evidence, the shorthand-writer.

Alternative (*a*), (apart altogether from the artificiality of describing a witness whose evidence is taken down and embodied in a transcript as a person "making a statement in "a document") is ruled out by the express terms of sub-s. 4. In the present case none of the conditions prescribed by that sub-section was fulfilled. The deceased Jenkins was not the maker or producer with his own hand of the transcript, nor is there any evidence that he signed or initialled it, or vouched for its accuracy in writing. The case might have been otherwise, obviously, if his evidence had been in a signed deposition.

Alternative (*b*) is that the "person" making a "state-"ment" in the "document" was the shorthand-writer, the maker of the transcript. If this contention is otherwise well founded, it is not barred, like the first alternative, by sub-s. 4 since a shorthand-writer "makes or produces" the transcript "with his own hand." But is it otherwise sound? The defendants say that it is by reason of the terms of s. 1, sub-s. 1 (i.) (*b*). It was argued that within the language of that provision the transcript is a "document" and a document which is a "continuous record," that the transcript writer made a "statement" in that "document" and that in so doing he was performing a duty to record information supplied to him, viz. Jenkins' evidence, and that Jenkins was a "person who "had or might reasonably be supposed to have personal "knowledge of the matter" dealt with in the statement. In support of his submission that the facts of this case fall within s. 1, sub-s. 1 (i.) (*b*) counsel cited *Edmonds* v. *Edmonds* (1) a decision of this court and binding on us; and *Bullock* v. *Borrett* (2) a decision of Finlay L.J. sitting as an additional judge of the King's Bench Division.

(1) [1947] P. 67.

(2) [1939] W. N. 49; 55 T. L. R. 408.

In *Edmonds* v. *Edmonds* (1) a husband was bringing divorce proceedings against his wife in England on the ground of his wife's adultery with the co-respondent in India, which he alleged had resulted in the birth of an illegitimate child there. In India the wife had brought affiliation proceedings against the co-respondent in respect of such illegitimate child. In the Indian proceedings, a Mrs. Ingles had given evidence which supported the wife's claim and hence the hypothesis of the wife's adultery. Such evidence was given on commission and taken down by a commissioner who signed the document. The Court of Appeal held that the document so signed, recording Mrs. Ingles' evidence, was admissible in the English suit for divorce by virtue of sub-s. 1 (i.) (*b*) of s. 1. The Court of Appeal undoubtedly took the view that evidence given before the commissioner in the Indian proceedings could answer the description of "information supplied" to such commissioner within sub-s. 1 (i.) (*b*) for the purpose of its admissibility in the English proceedings. But there are, it seems to us, two important distinctions between the facts of that case and those of the present. In that case the evidence was held to be "information supplied" to the maker of the document, the maker of the document being the commissioner, the court. To say that evidence given in court is information "supplied "to" the court seems to us an entirely different thing from saying, as we are invited to say in this case, that evidence given in court is information supplied to the shorthand-writer. If a man dictates a letter giving information to the person to whom he is writing it is an abuse of language to say he is engaged in "supplying information" to his shorthand-typist.

But there is a further ground of distinction. There is no suggestion in the report of *Edmonds* v. *Edmonds* (1) that Mrs. Ingles was in any way interested in the result of either the Indian or the English proceedings. It is clear, on the other hand, that Jenkins was a "person interested" in the result of the first action and would, if he had lived, have been interested in the result of the present proceedings, which were instituted before the first action came to trial. His reputation as a tyre-tester was involved, and apart from that he was interested as an employee in his employers winning the case. (See *Plomien Fuel Economiser Co., Ld.* v. *National Marketing Co.* (2).)

It was argued in answer to this objection that where sub-s. 3

(1) [1947] P. 67 (2) [1941] Ch. 248.

speaks of "any statement made by a person" the "person" spoken of is not the person whose evidence is transcribed, Jenkins, but the person transcribing it; in other words that the word "person" in sub-s. 3 is the same "person" as in sub-s. 1, in this case the shorthand-writer, and that the shorthand-writer is *not* a "person interested." On consideration, in spite of the similarity of the phrases employed in the two sub-sections, we do not think so narrow a construction can prevail. We think that in sub-s. 3 "a person" means any person whatsoever provided he is interested. On the narrower construction the mere accidental interposition of a shorthand-writer would let in statements of interested parties whose evidence, because interested, the Act intended to exclude, and sub-s. 3 would be largely stultified.

The other case relied on by Mr. Fox-Andrews, *Bullock* v. *Borrett* (1) is easily distinguishable and, in any case, though commanding the respect due to the Lord Justice who decided it sitting in the King's Bench Division, is not binding on this court. The construction of the Evidence Act, 1938, is not free from difficulties but in our view the evidence sought to be admitted in this instance is not let in by its provisions.

Mr. Fox-Andrews relied as a subsidiary argument on the fact that at the trial of this case a witness had put to him, in one question at least, views which cross-examining counsel suggested Jenkins had expressed in the earlier trial. Mr. Fox-Andrews relied on the rule that if part of a document is read by one side the whole of the text of it must, if the other side insist, also be read. We do not think that the operation of that rule, assuming it otherwise to be applicable, is attracted in every case in which counsel cites to a witness A statements given by a witness B in previous proceedings and says to A, "Do you agree?" No objection seems to have been made to those questions at the time nor, at the time, was any application made to let in the rest of Jenkins' evidence. We are of opinion that on neither ground can the evidence in question be let in.

Evidence rejected.

Solicitors for the defendants: *Stanley & Co., for D. H. Clarke, Swansea.*

Solicitors for the plaintiff: *Kenneth Brown, Baker, Baker for D. Brinley Morris, Llanelly.*

(1) [1943] W. N. 49; 55 T. L. R. 408.

R. P. C.

Affirmed. C.A. [1949] 1 All E.R. 776.

Affirmed. [1949] 2 K. B. 335

1948
July 23.

Lord Goddard C.J., Singleton and Slade JJ.

HELMAN *v.* HORSHAM AND WORTHING AREA ASSESSMENT COMMITTEE

Rating—Letting of some rooms in house—Retention of other rooms by landlord for personal use—Whether assessment committee entitled to assess for rating purposes the let rooms separated from the other rooms retained by landlord—Whether occupier of let rooms tenant or lodger—Whether landlord retained control over whole house—Rebuttable presumption that landlord retained control—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 23, *sub-s.* 1.

On March 8, 1947, H, the owner of a house in Worthing, entered into an oral agreement with M whereby M was to have the sole use and occupation of two living rooms and a kitchen-scullery (all on the first floor) and H was to remain in occupation of the rest of the house, i.e., all the rooms on the ground floor and the third living room on the first floor. It was also agreed that M should have the right in common with H to use the front and back doors, the bathroom and both w.c.'s and should have certain rights of access through the parts of the house retained by H.

At the time the agreement was made the rateable value of the house was 54*l.* Thereafter the assessment committee, upon a proposal made by the rating authority, decided that the two living-rooms and the kitchen-scullery on the first floor should be separately assessed at 22*l.* and that the remaining rooms of the house at 44*l.* It was contended on behalf of the assessment committee that s. 23, sub-s. 1, of the Rating and Valuation Act, 1925, gave them unfettered discretion to assess each set of rooms separately on the footing that there was a separate occupier of each set.

Held that the contention of the assessment committee was based on a mistaken reading of s. 23, sub-s. 1, of the Act of 1925 which could not on any construction be regarded as a section designed to override a long line of authorities beginning with *Bradley* v. *Baylis* (1881) 8 Q. B. D. 195, and followed by more recent cases including *Kent* v. *Fittall* [1911] 2 K. B. 1102. The fact that a landlord was living on the premises had always been treated as raising a presumption that he intended to retain control of the premises; and if he did so intend that would negative the suggestion that anyone else living in the house was a tenant as distinct from a lodger.

Applying those principles to the evidence, H never ceased to control the whole house and M was not a tenant but merely a lodger. Accordingly the assessment committee was not justified in making separate assessments.

SPECIAL CASE stated by the Rating and Valuation Committee of the Sussex quarter sessions who affirmed a decision

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

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of the assessment committee of the Horsham and Worthing areas whereby they divided for rating purposes a house known as 78, Brighton Road, Worthing. The house consisted of three living rooms, a kitchen-scullery and an outside w.c. on the ground floor; and three living-rooms, a kitchen-scullery and a combined bathroom and w.c. on the first floor. Before the house was divided for rating purposes its rateable value was 54*l.*

On March 8, 1947, the appellant, G. Helman, the owner and occupier of the house, entered into an oral agreement with one Miles whereby Miles was to have the sole use and occupation of two living-rooms and a kitchen-scullery (all on the first floor) and the appellant was to remain in occupation of the rest of the house, i.e., all the rooms on the ground floor and the third living-room on the first floor. It was also agreed that Miles should have the right in common with the appellant to use the front and back doors, the bathroom and both w.c.'s and should have certain rights of access through the parts of the house retained by the appellant. For his accommodation Miles was to pay 37*s.* 6*d.* per week.

Upon a proposal made by the rating authority for Worthing, the assessment committee decided that the two living-rooms and the kitchen-scullery on the first floor should be assessed at 22*l.* and the rooms on the ground floor and the remaining living-room on the first floor should be assessed at 44*l.*

The appellant appealed to the rating committee of quarter sessions and contended that the house should continue to be assessed as one hereditament. On the other hand the assessment committee contended that as from March 8, 1947, when Miles entered into occupation, the house became assessable as two hereditaments instead of as one.

The rating committee dismissed the appeal.

From that decision the appellant Helman now appealed.

Heathcote-Williams for the appellant, the owner of the house. It is common ground that in order to justify a separate assessment for rating purposes the occupier of part of the house must be at least a tenant and not merely a lodger. Miles was merely a lodger. The occupation of a lodger is not the occupation of a tenant, because in order to be a tenant a man must have the exclusive possession of the property which he occupies as against everyone including the landlord. That principle of law has always been recognized by the authorities, including the two cases on which I am relying for my next submission, viz., *Bradley* v. *Baylis* (1) and *Kent* v. *Fittall* (2), Secondly, if A lets certain rooms in his house to B and A retains possession of all or some of the remaining rooms in his house, there is a presumption that B is merely a lodger and not a tenant, because by remaining in possession of some of the rooms of the house A must be presumed to have control over the whole house. The presumption is rebuttable, but here there is no evidence to the contrary. This principle was clearly established in several cases one of the earliest of which was *Bradley v. Baylis* (1). Jessel M.R. laid down that if the landlord retained control over the whole house the occupier of some of the rooms was merely a lodger; and furthermore, the landlord's residence in the house raised a presumption that he retained such control. That was followed in the more recent case of *Kent* v. *Fittal* (2).

On the facts of this case and in accordance with the principles laid down in those cases it is quite apparent that the appellant has retained control of the house and that Miles is merely a lodger and not a tenant. Consequently, the rooms let to Miles cannot be rated separately.

J. D. Casswell K.C. and *H. J. Brown* for the respondents, the assessment committee. Under s. 23, sub-s 1, of the Rating and Valuation Act, 1925 (3), the respondents had unfettered discretion to assess for rating purposes the different sets of rooms separately. I rely on the words " if they think " fit." The discretion conferred by the statute exists whether or not the landlord retains control over the whole house. In this case the appellant did not retain control over the whole

(1) (1881) 8 Q. B. D. 195.

(2) [1911] 2 K. B. 1102.

(3) Rating and Valuation Act, 1925, s. 23, sub-s. 1: " Where a " building which was constructed " or has been adapted for the pur- " poses of a single dwelling-house, " or as to part thereof for such " purpose, and as to the remainder " thereof for any purpose other " than that of a dwelling or resi- " dence, is occupied in parts, the " rating authority or the assess- " ment committee in preparing, or " revising a draft valuation list, or " in amending a current amend- " ment list may, if they think fit, " having regard to all the circum- " stances of the case, including " the extent, if any, to which the " parts separately occupied have " been severed by structural alter- " ations, treat the building or any " portion thereof as a single here- " ditament, and a building or a " portion of a building so treated " as a single hereditament shall, for " the purposes of rating, be " deemed to be a single heredita- " ment in the occupation of the " person who receives the rents " payable in respect of the parts."

house, and Miles was at all material times a tenant and not a lodger. The fact that the owner of a hereditament shares something with the occupier of part of the hereditament does not necessarily give that owner control over the unshared part of the hereditament.

[LORD GODDARD C.J. Do you concede that if the landlord resides in the house that fact raises a rebuttable presumption that the landlord has control over the whole house ?]

According to the cases which have been cited there would be such a presumption but the assessment committee have statutory rights to act in the way they did act in this case. Furthermore the presumption is merely a rebuttable one, and in this case it is rebutted. If Miles had had exclusive possession of the whole of the first floor, and the appellant occupied merely the ground floor, in that case any presumption that the appellant had retained control over the whole house would have been completely rebutted. It is true that the appellant here retained occupation of a third room on the first floor, but it is only a question of degree. The case states " The said " Miles was to have the sole use and occupation of the two " living-rooms and the kitchen-scullery on the first floor," . . . . According to the plain meaning of those words the appellant agreed to renounce control over those rooms. Whether the presumption has or has not been rebutted is a question of fact and the tribunal which heard the evidence has decided that question of fact. This court should not interfere with that decision.

They also referred to *Allchurch* v. *The Assessment Committee and the Guardians of Hendon Union* (1).

Heathcote-Williams in reply.

LORD GODDARD C.J. This is a special case stated by the rating and valuation committee of the Sussex quarter sessions, who affirmed a decision of the assessment committee of the Horsham and Worthing area whereby they divided for rating purposes a house known as 78, Brighton Road, Worthing, rating three rooms on the first floor of the hereditament as a separate hereditament, and the rooms on the ground floor and one room on the first floor as another separate hereditament.

The case states that the appellant is the owner of these premises. To my mind it is a most important fact in this

(1) [1891] 2 Q. B. 436.

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case that he is not only the owner but he lives on the premises. "The said dwelling house was originally designed as a single "dwelling"—I read those words because I think it gives some indication, the reason for which I will give in a moment, why the quarter sessions came to the decision they did—"the "accommodation being three living-rooms, a kitchen-scullery "and a combined bathroom and w.c. on the first floor and "three living-rooms, a kitchen-scullery and outside w.c. on "the ground floor."

The first argument which Mr. Casswell for the respondents put forward was that the assessment committee had an unfettered discretion given to them by s. 23, sub-s. 1 of the Act of 1925 to rate as two or more hereditaments, any premises which have more than one occupier if the house was originally constructed as a single dwelling. That is the point he first put forward, but he did not tell us—no doubt he could not because I do not think he appeared below—whether the question on s. 23, sub-s. 1, had been argued before the court of quarter sessions, but as I find in para. 5 (*b*) of the case in stating the facts the words they used are: "The said dwelling-house "was originally designed as a single dwelling," which is quoting the opening words of s. 23, I think it is highly likely that the court of quarter sessions did consider s. 23, sub-s. 1, in connexion with this case, and perhaps thought that section gave them an uncontrolled discretion, and therefore they exercised their discretion in that way.

In my opinion that is a mistaken reading of s. 23. I do not think s. 23, sub-s. 1, gives the authority the uncontrolled discretion which it is contended it does. It is a somewhat involved sub-section, but the concluding words of the sub-section are perfectly intelligible if they are confined to treating a house, which may be divided into different lettings of one sort or another, as being a single hereditament so that the person who receives the rents shall be the person who is to be rated. But in this case it seems to me that a different set of circumstances arises because the landlord remains on the premises and receives no rent for that part of the premises which he occupies; he only receives rent for the part which the other person, in this case Miles, occupied. I think that the doubt which is expressed in Ryde on Rating, 6th ed., p. 48, "whether, if the owner or tenant of the whole building himself "occupies a part of it, he can be described in these words or "whether there is anyone who can be so described," is well founded. I do not think that section upon any construction can be regarded as a section designed or having the effect of overriding a long line of authorities beginning more particularly with *Bradley* v. *Baylis* (1), which is one of three cases all raising the same point, and which was decided as long ago as 1881. That case, like many of these cases which raise the point whether a person is to be regarded as a lodger or a tenant, arose under the Representation of the People Act; it was a question whether a person could claim a vote as an occupier, in the days before lodgers' votes. That was followed and considered in subsequent cases and more especially in the well-known case of *Kent* v. *Fittall* (2), there having been other decisions in earlier years also reported under the name of *Kent* v. *Fittall* and which are referred to in the judgment in the case, the citation of which I have just given. As I understand those cases, they come to this. The distinction between a lodger and a weekly tenant is often exceedingly difficult to define and it is often a matter of very considerable difficulty where to draw the line, but one matter which has always been treated in the later decisions not as conclusive but never a matter to be ignored, is whether the landlord remains resident on the premises himself. If a man has a house which is structurally altered, as many houses are now and have been since these decisions, so that there is one floor or two floors converted into what may properly be described as a separate flat, very often having its own door put on a half landing or something of that sort, the fact that the landlord may occupy the lower part as his own flat would have very little importance; it certainly would not be in any way conclusive that he did not intend the person who was, to use a neutral expression, in the upper part, to be a tenant in the true sense of the word and to have an estate in the upper part of the house. In a house where no structural alteration is made so that it remains just as it was built and people can walk up and down the stairs freely and go in and out of the rooms freely from a physical point of view, the fact that the landlord is living on the premises does seem to me to raise the presumption, and has always been treated in these cases as raising a presumption, that the landlord intends to retain control of the whole of the premises, and if the landlord intends to retain control of the whole of the premises, prima facie at least that negatives the fact that the person who is occupying rooms in a part of the house other than that in which the landlord lives, is a tenant in the true sense and not a lodger.

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(1) 8 Q. B. D. 195. (2) [1911] 2 K. B. 1102.

I refer briefly to the case of *Allan* v. *The Overseers of Liverpool* (1), which was in fact before *Bradley* v. *Baylis* (2); Blackburn J. said, (3) in a case where he was considering rating: "A lodger in a house, although he has the exclusive "use of rooms in the house, in the sense that nobody else is "to be there, and though his goods are stowed there, yet he "is not in exclusive occupation in that sense, because the "landlord is there for the purpose of being able, as landlords "commonly do in the case of lodgings, to have his own "servants to look after the house and the furniture, and has "retained to himself the occupation, though he has agreed "to give the exclusive enjoyment of the occupation to the "lodger." In *Kent* v. *Fittall* (4), Pickford J. said: "It has "been established by many cases that if a man lets off rooms "in a house in which he himself resides, although he may "give to other persons exclusive occupation of parts of the "house and render no services to those inmates, he never- "theless prima facie retains control, and the inmates are "lodgers and not occupying tenants."

Here we have, among other things, the fact that there was a bathroom in this house and that bathroom was to be used both by the landlord and by the other occupant of the house. The assessment committee had not, in treating these premises as two separate hereditaments, apparently included the bathroom at all; they have taken as one hereditament the two rooms on the first floor, with what is called the kitchenette, and attributed that to one hereditament, and in the other hereditament they have taken the other room on the first floor and the rooms on the ground floor. I do not suppose they intend the bathroom to be treated as a separate hereditament in itself; they have simply ignored it. But here the tenant is given the right to use the bathroom, and it seems to me that that does not mean he is to have the exclusive use; he has not got the exclusive use of the bathroom. The control of the bathroom here seems to me to remain in the landlord, and there is nothing here which I can see which goes to show that the landlord, who is living on the premises and has certainly only parted with—again I am using that in the popular sense and not in the strictly legal sense—two rooms and a kitchenette, which may for all I know be nothing more than a room with a cupboard and a gas stove in it, intended to part with the general control of those premises. He would, as I conceive, claim the right to go into these rooms to make any necessary repairs. The tenant is not put under any obligation to repair, but supposing something happened to the roof, the windows or the walls and it was letting in the wet, I should think that the landlord would have the right in this case, without having to seek permission, to enter in order that his property in which he is living might be properly preserved. He is taking a weekly rent. A weekly rent is a thing which you find not only in weekly lettings but it is very common, of course, for lodgers to pay so much a week. Unfurnished lodgings are perfectly well known; lodgings are not always furnished. In this case the rooms in fact come within the Furnished Houses (Rent Control) Act, 1946; that is not conclusive in any way, because both lodgings and tenancies come within that Act. But it seems to me if, as I think, the line of cases to which I have referred have not been impliedly overruled by s. 23, we still have this left: though the presence of the landlord on the hereditament is not of itself conclusive that the other occupant must be a lodger, it is not only a fact of great weight but that you ought to be able to find some facts which show that the landlord has renounced the right of control in the house, and it is on that point I think that quarter sessions have gone wrong. I can find no fact found which shows that the landlord has renounced his control over these premises; in fact I think the facts as found indicate that the landlord has not renounced his rights over the premises, and, moreover, if it was intended to vest an estate in the other occupant of the house giving him certain rights which are in the nature of an easement for the better enjoyment of what has been demised to him, it is most unlikely that that would have been done by a merely oral agreement even although it was only a weekly tenancy.

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(1) (1874) L. R. 9 Q. B. 180.
(2) 8 Q. B. D. 195.
(3) L. R. 9 Q. B. 180, 191.
(4) [1911] 2 K. B. 1102.

In the circumstances I come to the conclusion that I am bound to differ from the quarter sessions because I think that the proper inference to be drawn from the facts here is that Miles was no more than a lodger, and it can never have been intended by s. 23, sub-s. 1 of the Rating and Valuation Act, 1929, that if a man lets lodgings to one or more persons the rating authorities can treat all those people as separate tenants in their discretion and rate them in respect of the rooms as being in occupation of separate hereditaments. I, therefore, come to the conclusion that this house remained one hereditament, and that the facts found by the quarter sessions are not enough to show that any estate was created and granted to Miles. Miles was a lodger only. I arrive at that conclusion for the most part because I can find nothing to indicate that the landlord, the appellant in this case, had had in any shape or form renounced the control which he exercised, and so long as he remained in control of the premises I think the premises must be regarded as one hereditament.

I have only one other word to say with regard to one case which Mr. Cassell cited to us, *Allchurch* v. *Assessment Committee and Guardians of Hendon Union* (1). That case seems to me to differ on its facts in the most material respects. What had happened was that the landlord of the house let part of the house to A and part of the house to B ; he himself did not live on the premises at all. The assessment committee treated the whole house as jointly occupied by these two people and thereupon each of those two people became liable for the rates of the whole. They appealed and it was held they were entitled to be assessed separately. There, no one could pretend that they were the lodgers of the landlord. He parted with the whole house to them in consideration of the rent, and they were certainly not lodgers one with the other. It was a house let in part to one person and in part to the other and, therefore, ought to have been treated as two separate hereditaments. That seems to me to be an entirely different case from the one we are now considering.

For the reasons I have given, with all respect to the learned chairman of quarter sessions, I have come to the conclusion that we ought to answer the question submitted to us in the negative and to hold that these premises should be rated as one hereditament and not two.

SINGLETON J. I agree that this appeal should be allowed, and I have come to that conclusion with some regret, for I recognize that the question which had to be considered by the appeal committee of quarter sessions was very largely a question of fact.

The appellant was at all material times the owner of a house No. 78, Brighton Road, Worthing, and that house had on the first floor three living-rooms, a kitchen-scullery and a com-

(1) [1891] 2 Q. B. 436.

bined bathroom and w.c., and it had three living-rooms, a kitchen-scullery and an outside w.c. on the ground floor. A man named Miles was occupying two of the living-rooms and the kitchen-scullery on the first floor, and he also had a right in common with the appellant to use the bathroom and both of the water closets. A question of some difficulty arose, it was thought, as to whether he was a tenant or lodger. On the hearing before us the first point taken by Mr. Casswell was under s. 23, sub-s. 1, of the Rating and Valuation Act, 1925, which Act was "an Act to simplify and amend the law "with respect to the making and collection of rates, by the "consolidation of rates and otherwise, to promote uniformity "in the valuation of property for the purpose of rates, to "amend the law with respect to the valuation of machinery," etc. The submission which Mr. Casswell made on s. 23, sub-s. 1, was this, that the effect of it was that it mattered not, once you had a house in the occupation of one or more persons, whether the position was that of lodger or tenant; there were then separate occupations, and it was for the rating authority or the assessment committee to say whether they would assess the hereditament all in one or in different pieces. I do not think that that is the effect of s. 23, sub-s. 1 of the Act. In so far as material it reads as follows: "Where a building is occupied in parts, the rating authority "or the assessment committee may, if they think fit, treat "the building or any portion thereof as a single heredita- "ment and a building or a portion of a building so treated "as a single hereditament shall for the purposes of rating be "deemed to be a single hereditament in the occupation of the "person who receives the rents payable in respect of the parts." The word "occupied" is used earlier in the section. The occupier is the person to be rated, and has been since the Statute of Elizabeth. The word "occupied" used in s. 23, sub-s. 1, of the Act of 1925, which is a rating Act, is used I believe in the sense of rateable occupation, so that if you have a provision that in the case of a house occupied in parts to which s. 23, sub-s. 1, applies the rating authority may treat it which way they like, the effect of that sub-section is to give the rating authority an easy and a simple way to collect the rates. They may say: "We treat it as one hereditament "and we will collect the rates from the occupier, the person "who receives the rent payable in respect of the parts." Mr. Casswell's argument to this court was to the effect that

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s. 23, sub-s. 1, had made a change in the law of rating and it mattered not whether the persons in occupation of different parts were lodgers or tenants. I cannot think that that view of the section is right. The various authorities, to some of which my Lord has referred, are still set out in the current edition of Ryde and other text-books. They still stand for the purpose of applying the provisions of the Act of 1925. I do not know whether or how far that argument was used before the appeal committee of quarter sessions. If it was, it may have led to some misunderstanding. I cannot accept it as a sound view of s. 23, sub-s. 1, of the Act. As my Lord has said, the case for the consideration of this court does not set out some facts or some findings which one would have expected if the position had to be considered under the old law. There is a finding with regard to Miles and with regard to the two living-rooms and kitchen-scullery on the first floor. There is as my Lord has said, no finding as to the kind of control if any which was still held by the appellant over the whole of the premises. The doubt in my mind has been whether or not the case ought to have gone back for further consideration of the facts. If there had been any application made to us for that purpose I, speaking for myself, should have been inclined to take that course, but no such application has been made and we are left to deal with the facts as stated and with the main plank in the argument for the assessment committee that s. 23, sub-s. 1 of the Act of 1925 had made a difference in the law as counsel suggested. I agree that the appeal must be allowed.

SLADE J. Although I have considerable doubt in this case, I am not prepared to dissent from the conclusion at which my brethren have arrived. As I understand the position, the liability to be rated rests upon occupation, and it has been held that a lodger is not an occupier, but that generally speaking, a tenant is. The sole question, therefore, which seems to me to arise on this case is whether there was evidence before the appeal committee of quarter sessions which justified them in arriving at the conclusion that the relationship between the appellant, Mr. Helman, and Mr. Miles was the relationship of landlord and tenant and not merely the relationship of landlord and lodger. I am prepared to assume that where a landlord retains part of a hereditament in his own occupation, there is a presumption that he intends to retain control over the whole of the premises, but it seems to me that the best way in which such a presumption can be rebutted is by showing that in fact he has created the relationship of landlord and tenant between himself and some other person in respect of part of the premises, because if he has, not only does he retain no control over the part which he has demised but, on the contrary, the tenant of the demised part can eject the landlord or bring an action of trespass quare clausum fregit if the landlord attempts to enter that part of the premises. Therefore, I think the presumption carries the matter no further, and the sole point resolves itself into the question: aye or no, was there or was there not evidence—because we only deal with questions of law—which entitled the appeal committee of quarter sessions to come to the conclusion on the facts stated in this case that the contract which was entered into between the appellant Helman and Miles created the relationship of landlord and tenant. For that, of course, one must look at the facts as found by the case. Paragraph 5 (*e*) of the case says that on March 8, 1947, the appellant entered into a verbal tenancy agreement. I will assume for a moment that the words "verbal tenancy agreement" were used in the colloquial sense and that it was not intended to convey by those words alone that the relationship of landlord and tenant was thereby created, but the same paragraph goes on to say: "The said Miles was to have the sole use and "occupation of the two living rooms and the kitchen-scullery "on the first floor," and I emphasize the next words, "the "appellant remaining in occupation of the rooms on the "ground floor." I emphasize the contrast between remaining in occupation of the rooms on the ground floor and conferring on Miles the right to the sole use and occupation of the rooms on the first floor. If there was evidence upon which the committee of quarter sessions were entitled to come to the conclusion that the agreement in fact entered into between Helman and Miles created the relationship of landlord and tenant, it is not a decision with which we can interfere because no question of law would arise. The only question of law which could arise would be, as I have already indicated, that there was no evidence upon which the committee was entitled to reach that conclusion. I do not base my doubt upon s. 23, sub-s. 1 of the Rating and Valuation Act of 1925 because I should require much more argument upon that section before I cared to express any view as to its applicability

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or otherwise. I base my judgment solely on the question whether there was not some evidence on which the committee were entitled to arrive at the conclusion at which I must assume they did arrive. As I say, I have some doubt on this point, but it is a doubt and a doubt only, and it is not one on which I feel justified in dissenting from the conclusion which my brethren have reached.

Appeal allowed.
Leave to appeal to the Court of Appeal.

Solicitors for the appellant: *A. Kramer & Co.*

Solicitors for the respondents: *Waller, Neale & Co., for Marsh & Ferriman, Worthing.*

Referred to. FALMOUTH BOAT CONSTRUCTION CO., LD. *v.* HOWELL [1950] 2 K. B. 16

Considered. WOOLFE *v.* WEXLER [1951] 2 K. B. 154

C. A.

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June 4, 7, 8, 29.

Tucker, Somervell and Cohen L.JJ.

BOSTEL BROS., LIMITED *v.* HURLOCK.

Emergency legislation—Building—Licence limiting cost of work—Work in excess of limit prima facie unlicensed—Builder's claim for cost of unlawful work—Defence (*General*) *Regulations*, 1939 (*St. R. & O.*, 1939, *No.* 927), *reg.* 56A (*as amended*), *paras.* (1) *to* (3), (6) *to* (8).

Regulation 56A of the Defence (General) Regulations in the amended form given to it by Statutory Rules and Orders, 1941, No. 1596 (as amended by St. R. & O. 1945, No. 502), by para. 2, makes specified building operations unlawful unless authorized by licence. By para. 6 of the regulation, the person doing the work and the person at whose expenses it is done are each guilty of an offence, unless the defences laid down in the provisoes to the paragraph are made out. By para. 8 (as amended by St. R. & O. 1945, No. 502, para. 4). "If any condition attached "to an authorization or licence . . . . is contravened or not "complied with, then, whether or not the authorization or licence "is revoked, the person at whose expense . . . . the work is "carried out . . . . and . . . . the person . . . . carrying out "the work . . . . shall each be guilty of an offence against this "regulation."

Work done in excess of the cost prescribed by a building licence issued under reg. 56A is work done without a licence, thereby prima facie contravenes para. (1.), (2.) or (3.), as the case may be, and is accordingly prima facie unlawful; it is not a breach of a condition of the licence merely giving rise to liability to a penalty under para. (8.). The excess work will, therefore, be unlawful, unless the builder establishes one or other of the defences set out in the provisoes to para. (6.), and if it is unlawful he will not be entitled to recover the cost of it from the person for whom the work was done.

If the cost of work for which a licence is issued includes the cost of providing and fixing a given article, and the cost so licensed is exceeded, it is not permissible to reduce the excess by deducting the actual cost of the article.

Quaere, however, whether the price of supplying an article which the builder has in stock, as well as the cost of fitting it, must fall within the cost limited by the licence, and further whether the cost of all articles to be used in the work must fall within the limit including those which have already been obtained or those which are obtainable without licence.

Langton v. *Hughes* (1813) 1 M. & S. 593, applied.

APPEAL from Brighton county court.

The plaintiffs, Bostel Brothers, Ld., a company of builders, claimed 98*l.* 4*s.* 1*d.*, for work done by them on the orders of the defendant, William Albert Ernest Hurlock, to a house called Hay Tor at Saltdean. The defendant had bought the house because two friends of his, one Pierson and his wife, required a house in which to live. Pierson later bought the house from him. After the defendant and Mrs. Pierson had inspected the house with a director of the building company, the latter prepared a specification and estimate, dated March 15, 1945, for 260*l.* including the merely provisional sum of 10*l.* for repairing the electric installations. A licence, dated May 2, 1945, was duly obtained in the name of Mrs. Pierson for the specified work, and an additional licence, for 10*l.* only, in August, 1945, for the additional electrical work. The senior member of the company fell ill before the work was completed, and the final account was prepared and sent in by his junior on January 21, 1946. The total amount charged was 408*l.* The defendant alleged that he had not ordered all the work charged for. The builders therefore brought an action against him for a sum ultimately fixed at 98*l.* 4*s.* 0*d.*

The defendant was prepared to pay the amount of the account rendered for the work for which the estimate was given, but contended that the additional work was done without a building licence in respect of it, that that work was therefore unlawful, and that the builders were not entitled to payment of the sum claimed in respect of it.

The county court judge found as facts that the work charged for was well and honestly done and that the chief additional item was extra electrical work necessary largely for compliance with the local electricity company's requirements. He held that, on the true construction of reg. 56A of the Defence (General) Regulations, 1939, as amended, there had been no contravention of the regulation, and gave judgment for the builders for the sum claimed.

The defendant appealed.

Gardiner K.C. and *Gumbel* for the defendant. The defences afforded by provisoes (*a*) and *b*) to para. (6.) of reg. 56A apply only where the work is unlawful because done without a licence. That is, they apply to work in contravention of paras. (1.) to (3.), all of which concern work which must not be done without a licence. The provisoes do not afford a defence to doing work which is unlawful because in breach of a condition of the licence. That is what has occurred here through the doing of work in excess of the amount limited by the licence. The provisoes must not be construed as if they constituted a separate paragraph: they are provisoes referring to paras. (1.) to (3.). It may be difficult to decide whether work done in addition to what is permitted by the licence is work done without a licence or work done in breach of the limiting condition of the licence; but, in general, the doing of additional work is a breach of the condition of the licence. Work done in excess of the permitted cost will not be likely to be regarded by the builder as work done without a licence.

Even if this was a case of work done without a licence, there were no circumstances of emergency here such as to bring proviso (*b*) into operation in the builders' favour. The mere fact that it will be extremely convenient for the building owner to go into occupation does not constitute an "emergency."

Brightman & Co., Ld. v. *Tate* (1) and *Mahmoud* v. *Ispahani* (2) show the way in which the courts have approached regulations of this kind.

This excess work was a breach of condition and therefore unlawful. Paragraph (8.), unlike para. (6.), affords no defence to such a breach, and the builders are accordingly not entitled to recover.

Beney K.C. and *Dutton Briant* for the builders. The illegality created by the regulation is the carrying out of an operation without a licence. Paragraphs (6.) and (8.) both concern criminal responsibility. Paragraph (6.) refers to work

(1) [1919] 1 K. B. 463. (2) [1921] 2 K. B. 716.

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in respect of which no licence is in force, and para. (8.) to infringement of conditions which can be attached to a licence under para. (7.). Mere infringement of a condition does not do away with the licence. The effect of exceeding the sum limited may be, not to touch the force of the licence, but merely to create liability to a penalty. That does not amount to illegality entitling the defendant to withhold payment for the work done.

[SOMERVELL L.J. Surely the limitation of amount is not a condition of the licence merely? It represents what the licensee is licensed to do. When the sum is exhausted the licence runs out.]

Assuming that the provisoes to para. (6.) are applicable here because the extra work was illegal, the necessary emergency exists because, while the work was in progress, it emerged that far more work would be necessary than had been anticipated to put the electric installation of the house in order and before the electricity authority would consent to supply current to it. There was material on which the county court judge was entitled to find that proviso (*a*) or (*b*) applied.

[TUCKER L.J. The county court judge's finding that proviso (*a*) or (*b*) applies must be made on the basis that the offence, if any, was a breach of para. (2.), which involves illegal work.]

If the defendant is right in saying that cost is a condition attachable to a licence under para. (7.), so that what the builders have done is to commit a breach of condition within para. (8.), then the only result is that the builders are liable to prosecution, and the legality of the work done is unaffected. If, on the other hand, the defendant's proposition is wrong, and cost is not a condition of the licence but a limit on the work licensed under para. (2.), then it is para. (6.) with its provisoes which is applicable, and, it is submitted, the builders have made out a defence under them, for the very nature of the work in question was such as to create circumstances of emergency. The circumstances were all before the county court judge, and the court should take a broad view of the matter.

The argument for the defendant is that in all cases where the doing of work results in liability to a penalty the work thus done must have been unlawful, so that the cost of it cannot be recovered. It is submitted that the law does not go so far, and that it is a question of construction in every case whether it is intended, in the enactment creating an offence with regard to work requiring a licence, to make the work done in contravention of the enactment unlawful, or merely to impose a penalty while leaving the work done lawful. The words in para. (8.) "whether or not the . . . . licence is revoked" would be pointless if breaking a condition of a licence automatically revoked the licence and rendered the work unlawful. [Observations of Atkin L.J. in *Mahmoud* v. *Ispahani* (1) referred to.]

Dutton Briant followed.

Gardiner K.C. in reply. No express words are required to make illegal work done in excess of limited cost, because that is the whole object of reg. 56A. The condition of the licence is broken by the carrying out of the particular work resulting in excess over the permitted cost. Therefore that permitted work is illegal. There are, in any event, no facts here to found the defences given by the provisoes to para. (6.). Paragraph (6.) only applies where there is no licence in force.

To conclude, there seem to be three possible views : (1.) once the licensed sum has been spent, the licence is exhausted ; everything else done is in breach of paras. (1.), (2.) or (3.) and illegal, and para. (6.) applies ; (2.) at the other end of the scale is the view that para. (6.) has no application where there is a licence, and that every contravention is a breach of condition falling under para. (8.) ; (3.) an intermediate construction of the regulation is to consider the work covered by the licence and see what was actually done : if the extra work is covered by the licence, all that has been done is to exceed the permitted cost and break a condition under para. (8.). If the extra work appears not to be covered by the licence then work has been done without a licence, the contravention being under para. (6.) and not necessarily under para. (8.). On any construction the defendant is entitled to resist the builders' claim : if the contravention comes under para. (6.), the provisoes to that paragraph do not apply on the facts. If there has been a contravention of para. (8.) by breach of a condition of the licence, equally the work thus done in contravention of the paragraph is illegal.

Cur. adv. vult.

June 29. SOMERVELL L.J., reading the judgment of the court, referred to the issues raised on the pleadings, and continued : The county court judge held that the defence that the extras were not ordered failed, and the defendant before us accepted this finding. The judge found that the defence of illegality was not made out, and from this part of his judgment the defendant appeals.

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(1) [1921] 2 K. B. 716, 731.

Before referring to the statutory provisions as to the necessity for licences it will be convenient to recapitulate the main facts, and the principle of law which has to be applied. All the work in question was work on a house called " Hay Tor " at Saltdean. This house had been bought by the defendant, and the builders were instructed by him to prepare an estimate for putting it into habitable condition. It had been vacant for some time, and was to be inhabited by one Pierson and his wife, who were friends of the defendant. The estimate, dated March 15, 1945, was for 260*l.* It covered the ordinary items that one would expect. The electric light and power installation was to be inspected and defects made good. In respect of this item a provisional sum of 10*l.* was referred to which was to be deducted from the estimate if no defects were found. The estimate was accepted, and the licence was applied for on April 4, 1945. On May 2 a licence was issued to Mrs. Pierson to carry out repairs and decorations and overhaul the electrical installation at a total cost not exceeding 278*l.* The application form and the specification accompanying it have been lost. The work was carried out between June and September, 1945. The electric light installation was found to be considerably defective, and from time to time, as often happens in these circumstances, further work on other matters was found to be necessary and was ordered and done. On July 5 a further licence was applied for, which was granted on August 7, covering the repair of a fence and gate and overhaul of the electric light installation at a cost not exceeding 15*l.* The total cost of the electrical work according to the builders' bill was about 50*l.*

The principle of law relied on was thus stated concisely and in a form appropriate to the present issue by Lord Ellenborough C.J. in *Langton* v. *Hughes* (1): " What is done in " contravention of the provisions of an Act of Parliament, " cannot be made the subject matter of an action."

We are concerned with a Defence Regulation which has the same force as an Act of Parliament. In *Brightman & Co., Ld.* v. *Tate* (2), the general subject matter was similar to that in the present appeal. The plaintiff, a builder, claimed for the balance of an account. There was a prohibition of the carrying on of

(1) (1813) M. & S. 593, 596.

(2) [1919] 1 K. B. 463.

building work above a certain cost without a licence. The defendants asserted that as from a certain date the work done by the plaintiff was outside the licence granted and was illegally performed. It was held that the work in respect of which the claim was made was outside the licence and, having regard to the terms of the order, was illegal, and that the sum could not be recovered. The same principle was considered and applied by this court in *Mahmoud* v. *Ispahani* (1). In that case the plaintiff had sold to the defendant a certain quantity of linseed oil. There was an order of which the effect was that buyers and sellers of linseed oil must be licensed. The plaintiff had a licence and the defendant had not, though he had in fact told the plaintiff that he had a licence. It was held that the contract was prohibited by the order, and that the plaintiff could not recover. In the earlier case McCardie J., had expressed some doubt whether the principle applied if the plaintiff had reason to believe that there was no illegality. The decision made it clear that any such doubt was not well founded. The principle is, of course, only applicable if the contract or the work done under the contract is illegal.

I will now turn to the relevant provisions of the Defence Regulations. The Regulation with which we are concerned is the amended Regulation 56A (St. R. & O. 1941, No. 1596), as amended by St. R. & O. 1941, No. 2011. These contain the law which was in force up to July 1, 1945. Further amendments came into force on that date under St. R. & O. 1945, No. 502. As will be seen, under the code which we have to apply there were certain provisions authorizing work to be done without a licence.

The county court judge held that the work sued for was covered by these provisions, and the main issue is whether there was any evidence on which he could so find. Paragraph (2.) of the new reg. 56A in its original form was as follows : " Subject " to the provisions of this regulation, the execution in the United " Kingdom of any operation begun at any time on or after " January 1, 1942, which involves the doing of any description " of any work specified in part III of the sixth schedule to " these regulations, not being an operation executed for a " purpose specified in the first column of the table set out in " part I of that schedule, shall be unlawful except in so far as " there is in force in respect thereof a licence granted by the " Minister : Provided that no licence shall be required by

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(1) [1921] 2 K. B. 716.

" virtue of this paragraph if the total cost of the work of that " description involved in the operation does not exceed such " sum as may be prescribed by order of the Minister in relation " to work of that description involved in an operation begun " at that time." The relevant words of part III of the sixth schedule are : " Work done in the construction, reconstruction, " alteration, demolition, repair or decoration of a building or of " any such works as are mentioned in part II of this schedule." The relevant words of part II are " Works required for the " purpose of providing water, light, heating or other services " for a building." The next relevant paragraph is para. (6.) which I will read as amended by St. R. & O. 1941, No. 2011, which substituted a new para. (*b*) in the proviso : " If any " operation is executed or work is carried out in contravention " of any of the first three paragraphs of this regulation the " person at whose expense the operation is executed or the " work is carried out, and (where he is not the same person) " the person undertaking the execution of the operation or the " carrying out of the work, and (in either case) any architect, " engineer or other person employed in an advisory or supervisory capacity in connexion with the execution of the " operation or the carrying out of the work shall each be guilty " of an offence against this regulation : Provided that— " (*a*) where it would be a defence for a person charged with an " offence against this regulation to prove that the cost of an " operation or of any relevant work did not exceed a particular amount, it shall also be a defence for him to prove " that at the time when the operation in respect of which he " is charged was begun or the work in respect of which he is " charged was carried out he had reasonable grounds for " believing that the said cost would not exceed that amount ; " (*b*) it shall be a defence for a person charged with a contravention of any of the first three paragraphs of this regulation " to prove that the acts done without authorization or licence " were urgently necessary and were done in circumstances of " emergency which rendered it impracticable to obtain " authorization thereof or a licence therefor." The next relevant paragraph is para. (8.) which, as amended by para. (4.) of St. R. & O. 1945, No. 502, provides, " If any condition " attached to an authorization or licence granted for the " purposes of this regulation is contravened or not complied " with, then, whether or not the authorization or licence is " revoked, the person at whose expense the operation is "executed or the work is carried out in respect of which the "authorization or licence was granted and (where he is not the "same person) the person undertaking the execution of the "operation, or the carrying out of the work, and any architect, "engineer or other person employed in an advisory or supervisory capacity in connexion with the execution of the operation or the carrying out of the work shall each be guilty of "an offence against this regulation."

The relevant amendments made by the Order of 1945 are as follows: "1. For paras. (2.) and (3.) of reg. 56A of the Defence "(General) Regulations, 1939, there shall be substituted the "following paragraph: '(2.) Subject to the provisions of this "'regulation, the carrying out in the United Kingdom, except "'for a purpose specified in the first column of the table set out "'in part I of the sixth schedule to these regulations, of any "'work specified in part III of that schedule or of any "'maintenance work on a building or on any such works as "'are mentioned in part II of that schedule, shall be unlawful "'except in so far as there is in force in respect thereof a licence "'granted by the Minister: Provided that the Minister may "'by order authorize the carrying out of such work without a "'licence within such limits of cost as may be specified in the "'order, and may prescribe different limits of cost for different "'classes of work or for different classes of property or for "'different areas, and any such order may, without prejudice "'to the generality of this provision, limit the cost of the work, "'or of the work of any class, that may be carried out in any "'period specified in the order on any single property as "'defined in the order'. 2. Any licence granted by the "Minister of Works under para. (2.) or para. (3.) of the said "regulation as it had effect before the date on which this Order "comes into operation, being a licence in force immediately "before the said date, shall continue in force and shall have "'effect as if it had been granted under para. (2.) of the said "'regulation as amended by this Order." Paragraph 4 of the Order of 1945 amends para. (8.) of the regulation in the manner above indicated. So far as para. (8.) is concerned, it will be seen that the amendment adds to the offenders the person at whose expense the work is carried out. The work contemplated was, in our view, work for which under the regulation a licence was necessary.

It has been thought right to set out these amendments, but, in our opinion, if the work done was an offence under the original

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or amended code the principle referred to in the earlier part of this judgment is plainly applicable. There was no material alteration, so far as this case is concerned, by the amendments made in 1945. If the work in respect of which the claim is made was, as it clearly was, in excess of the cost covered by the licences, and cannot be brought within the proviso, to para. (6.) if applicable, then, in our opinion, it was illegal, the principle referred to applies, and the builders cannot recover.

The first licence issued was as follows: "Subject to the "conditions hereafter set out licence is hereby granted to carry "out repairs and decoration, also overhaul electrical installation "in accordance with application dated April 4, 1945, and "relative specification lodged with the Ministry at 'Hay Tor,' "Arundel Drive, Saltdean, Sussex, at a total cost not exceeding "278*l*." The fifth condition is: "In the carrying out of the "work authorized by this licence the total cost specified above "shall not be exceeded and no work shall be carried out in "purported exercise of the authority conferred by this licence "except as specified above." The second licence was as follows: "Subject to the conditions hereafter set out licence is hereby "granted to incur additional expenditure to that authorized "under licence No. 0/12/45/4181 to repair fence and gate and "overhaul electric light installation in accordance with application dated July 5, 1945, lodged with the Ministry at 'Hay "'Tor,' Arundel Drive, Saltdean, Sussex, at a total cost not "exceeding 15*l*." and there was a similar condition to that already read.

If a licence is granted to do certain work under para. (2.) at a certain cost and the cost is exceeded, is this prima facie a contravention of para. (2.), and, therefore, within para. (6.), or is there no contravention of para. (2.), the matter falling to be dealt with solely under para. (8.) as a breach of a condition attached to the licence? The importance of this is that para. (8.) contains no exception. If, therefore, the matter had to be considered solely under para. (8.), the question whether the builders can justify not obtaining a further licence does not arise. In our opinion it is prima facie a breach of para. (2.). The proviso to that paragraph shows that the licensing system operates on cost. If the cost covered by a licence is exceeded, there is, we think, no licence in force in respect of the work covered by the excess. The words of para. (6.), including the provisoes, apply to such a case. It may be that there has also been a breach of a condition within para. (8.). It is unnecessary to analyse this point further, as we think that the defendant succeeds on the assumption more favourable to the plaintiff builders, namely, that the provisoes to para. (6.) are applicable.

The county court judge proceeded on the basis that there was no illegality if the case could be brought within the provisoes or one of them. We think that this is plainly right. Paragraph (2.) begins with the words, "Subject to the "provisions of this regulation," and the regulation must be read as a whole to find out what is prohibited.

[His Lordship discussed the facts relating to the question whether the proviso was applicable, and continued :] It is, therefore, necessary to consider whether on the evidence, the judge's conclusion can be justified. [His Lordship further discussed the evidence, and continued :] In our opinion there is no evidence which justifies a finding that the case falls within proviso (*a*) or (*b*). The failure to apply may well have been due to Bostel senior's illness. Bostel junior had not been concerned with the preparation of the original estimate, and he may well not have been aware of the extent of the extras and not had time to go into the matter fully.

Mr. Beney made a final submission on behalf of the builders based on an argument that if, in the original estimate or in the extras, an article had to be *supplied* and fixed, the cost of the article did not have to be covered by the licence. In the present case the estimate which was the basis of the application for the first licence covered two new grates which were to be supplied and fixed. From the account delivered it appears that these were estimated to cost 30*l*. The account also shows that the grates were bought at a total cost of 31*l*. 10*s*. 0*d*. This, however, is irrelevant. If the cost of the work for which a licence is obtained includes the cost of providing and fixing an article and the licensed cost is exceeded, it is not, in our view, permissible to deduct the actual cost of the article from the excess and seek to reduce the apparent excess to that extent. Therefore in the present case it is not permissible to deduct the 30*l*.

A somewhat different issue may arise with regard to the extras. This point was never raised and investigated below, but Mr. Beney is, of course, entitled to support the judgment on any point which is open to him on the facts found. In the present case the relevant facts are not found, in that Mr. Beney has to ask us to estimate the proportion of a composite figure, for example, for supplying and fixing a cistern, which should

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be regarded as the cost of the cistern. There are other difficulties. If a builder already has an article, must the building licence cover its cost as well as the cost of fixing it? If he has not the article, it certainly is not at all clear that the cost should not be covered by the licence.

We express no opinion on the question, obviously an important one, whether the cost of all articles to be used in the work in respect of which a licence is applied for must, as a matter of law, be included, even if in fact, apart from this regulation, the article has been already obtained or is obtainable without a licence. It may depend on what the article is. If the point had been raised below, this could have been gone into and the builders could themselves have given evidence as to the circumstances in which these articles were obtained. In our opinion, even assuming that the point could have been maintained as to the cost of one or more of the articles in question—a boiler, a cistern and some roofing felt—it is too late to seek to raise it at this stage. For these reasons, the appeal must be allowed.

Appeal allowed.

Solicitors for the defendant: *Clifford-Turner & Co.*

Solicitors for the plaintiff builders: *R. L. Mason, for Gates & Co., Brighton.*

R. C. C.

Followed. SWANSON *v.* FORTON.
[1949] 1 Ch. 148

LEE *v.* K. CARTER, LIMITED AND ANOTHER.

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1948
July 21, 22.
Tucker, Bucknill and Somervell L.JJ.

Landlord and tenant—Rent restriction—Lease of flat to limited company —Application to assign to individual—Landlord's refusal due to incidence of Rent Restriction Acts—Whether reasonable.

Costs—Premises outside county court jurisdiction—Action in High Court —Defence raising Rent Restriction Acts—Remission of action to county court—Successful plaintiff's claim to High Court costs— Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 17 (2.)—*County Courts Act,* 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 48.

A limited company held a lease of a flat in London at 275*l.* a year. The lease contained a covenant that the company would not assign it without the landlord's previous consent in writing, which was not to be unreasonably withheld, and it was provided that that covenant was to be deemed not to be broken by the residence in the flat of a director of the company. The landlord refused permission to the company to assign the short residue of the term

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to the director on the ground that she would be able on expiry of the lease to hold over as a statutory tenant under the Rent Restriction Acts, since the rateable value of the flat was 100*l.* a year. The company purported to assign the lease to the director without permission, and the director refused to quit the flat on the expiry of the lease, thereupon the landlord brought an action for possession.

Held, that the question whether the withholding of consent was reasonable was one for determination on the particular facts of the case; and that, as assignment of the lease would have, as between the company and the director, no practical consequences since the director was already in possession and could remain so for the residue of the term, and as the sole reason for the purported assignment was to gain for the director the protection of the Rent Restriction Acts, the refusal of consent was reasonable within the principles laid down by Tomlin J., and the Court of Appeal in *Houlder Bros. & Co.* v. *Gibbs* [1925] 1 Ch. 198, 575; in that it was a matter connected with the personality of the proposed assignee or the use and occupation of the demised premises, and so directly affected the subject matter of the lease.

Hill v. *Swanson* (1946) 62 T. L. R. 719 distinguished.

Per SOMERVELL L.J. There is no principle on which a landlord will always be held reasonable in withholding consent to the assignment of a lease by a limited company to an individual.

As the rent of the flat was such as to exclude the jurisdiction of the county court under s. 48 of the County Courts Act, 1934, the landlord brought his action for possession in the High Court. The matter having come before the master on a summons for judgment under R. S. C. Or. 14, the second defendant contended by affidavit that she was the lawful assignee of the lease and as such entitled to the protection of the Rent Restriction Acts. The master thereupon remitted the proceedings to the county court. The county court judge, having made an order for possession, awarded the landlords costs on the High Court scale down to the date of remission.

By s. 17 (2.) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the county court has jurisdiction to entertain proceedings arising out of the Act notwithstanding that the claim would otherwise lie outside that jurisdiction, " and, " if a person takes proceedings under this Act in the High Court " which he could have taken in the county court, he shall not be " entitled to recover any costs."

Held, that the landlord was not entitled to any costs down to the date of the remission, because he could not escape the operation, in respect of costs, of s. 17 (2.), under the jurisdiction conferred by which he had obtained an order for possession; because the question of jurisdiction could not depend on the stage at which the defendant had raised the defence of the Rent Restriction Acts; and because the landlord had at all times been aware of the purpose of the purported assignment and of the director's intention to invoke the protection of the Acts.

APPEAL from Bloomsbury county court.

By a lease dated March 1, 1940, the plaintiff, Charles Edward Lee, let to the first defendants, K. Carter, Ld. for seven years from March 28, 1940, at 275*l*. a year a flat at No. 3, Cavendish Court, London. It was a term of the lease that the company would not without the landlord's previous consent in writing assign or sub-let the flat, the consent not to be unreasonably withheld. It was provided that the use of the flat by the second defendant, Mrs. Kate Bowman, the secretary and a director of the company (who guaranteed the lease), and her family, or by any director of the company, was not to be taken as a breach of that covenant. On January 30, 1947, the company without the landlord's consent purported to assign the remainder of the term of the lease to the second defendant. The landlord refused to register the assignment or to accept rent from the second defendant. By specially indorsed writ he claimed possession of the flat on the ground that the lease to the company expired on March 25, 1947 and that the second defendant was in unlawful possession.

The second defendant in her affidavit stated that the rateable value of the flat was 100*l*. a year, so that it was within the Rent Restriction Acts; that when the lease was granted she and the company had both produced references which the landlord had presumably considered satisfactory; that she had lived in the flat with her family since the beginning of the lease; that on March 8, 1946 and January 17, 1947, the company asked, and the landlord unreasonably refused, permission to assign the lease to her; that the company therefore assigned the lease to her on January 29, 1947, and notified the landlord of the assignment; but that he refused to register the assignment, or to accept rent from her. She contended that, as the lease had expired, she occupied the flat as a statutory tenant under the Rent Restriction Acts.

The county court judge held that the landlord was within his legal rights in refusing to consent to the assignment because it would effect a change in the whole nature of the tenancy, since the second defendant would be, whereas the company could not be, entitled to the protection of the Acts. He therefore held the landlord's refusal to be reasonable and made an order for possession. The defendants appealed.

Charles Lawson for the defendants. The landlord's refusal to consent to the assignment was unreasonable, because it had nothing to do with the character and personality of the proposed assignee. *Houlder Brothers & Co., Ld.* v. *Gibbs* (1) is an authority for that proposition, in particular the observations of Tomlin J. (2). Tomlin J.'s judgment was accepted by the Master of the Rolls on the appeal (3). The observations of Warrington L.J. (4) also support the argument that there were no valid reasons for the withholding of consent here.

[SOMERVELL L.J. What the judges said in that case cannot be taken as covering a situation, such as that here, which they clearly had not in mind.]

If the landlord wished to protect himself against a possible statutory tenancy, the way to do it was to provide for it in the lease. He was free to have a provision inserted that the term should in no circumstances be assigned. [*Tredegar* v. *Harwood* (5) referred to.] The basic principle of the authorities, as accepted by Evershed J. in *Hill* v. *Swanson* (6), is that the ground for refusal of consent must be connected with the use and occupation of the premises and the personality of the proposed assignee. The ground for the landlord's refusal here cannot be said to be connected with the use and occupation of the flat in view of the definition of use and occupation given by Evershed J., in *Hill* v. *Swanson* (7). The mere fact that premises would be occupied by a statutory tenant after the lease had expired, or that during the term they will be occupied by an individual instead of a company, is not referable to "use "and occupation" as defined by Evershed J. On the same line of reasoning it cannot be right to say that the refusal was reasonable merely because the end of the term was near.

Plume (with him *Heathcote-Williams*) for the landlord. In the cases on which the defendants rely the landlord was objecting to the assignment for reasons of his own, right outside the relationship of landlord and tenant or the nature of the use and occupation of the demised premises. An example of such reasons was in *Hill* v. *Swanson* (6), where the landlord withheld his consent because he wanted possession himself before the end of the lease. The proposed assignment here is obviously not in good faith, for the proposed assignee is already in occupation of the premises. It is certainly a matter touching the use and occupation of these premises that, if the assignment is effective, for the contractual

(1) [1925] Ch. 198.
(2) Ibid. 209.
(3) [1925] Ch. 575, 581.
(4) Ibid. 585.
(5) [1929] A. C. 72.
(6) (1946) 62 T. L. R. 719.
(7) Ibid. 720.

relationship between the landlord and his tenant will be substituted a statutory tenancy. [He was stopped.]

Lawson in reply. A statutory relationship is not substituted for the contractual relationship. At the material time, that is, when the consent was required to be given, there was no question of any statutory relationship. There would merely be substitution of one contractual relationship for another, though certain statutory consequences might, admittedly, follow. It was open to the landlord to avert such a situation by insisting on insertion in the lease of a clause forbidding assignment absolutely.

TUCKER L.J. The sole question is whether or not the defendant company were entitled to assign the benefit of this lease to the second defendant without the consent of the landlord. In other words, was the landlord's consent unreasonably withheld? If it was, the company were entitled to assign without his consent.

The facts are very unusual and it is necessary to refer in some detail to the provisions in this lease. It was made between the plaintiff, as lessor, the company, as lessees, and the second defendant, as guarantor. The lease contained the usual provisions, and in cl. 2 (6.) (this being one of the lessees' covenants) appear these words, "Not at any time during the said term to "use the said flat or any part thereof or permit the same or "any part thereof to be used for the exercise or carrying on of "any art profession trade business charity occupation or calling "whatsoever except that of a model dress designer and "manufacturer nor as a receptacle for lunatic or invalid persons "or otherwise than as a private residence and for the business "of a model dress designer and manufacturer nor use the said "flat . . . ," and certain illegal and immoral purposes are referred to. "(7.) Not without the lessor's previous consent "in writing to assign underlet or part with the possession of the "said flat or any part thereof (such consent to an assignment or "underletting of the whole of the said flat not to be "unreasonably withheld) provided always that the lessor may "as a condition of such consent to an assignment require the "proposed assignee to enter into direct covenants with the "lessor to perform and observe all the covenants on the "lessee's part herein contained and non-compliance with such "condition shall be deemed to be a reasonable ground for "refusing such consent notwithstanding the respectability "and financial responsibility of the proposed assignee provided "however that the use of the flat as a residence by Mrs. Kate "Bowman and her family or any director of the lessee shall "not be deemed a breach of this covenant." Clause 2 (18.) contains a covenant at the expiration of the term to deliver up the flat to the lessor in good and substantial repair and condition. Clause 4 contains a provision for forfeiture in the event of any non-observance or breach of any condition contained in the lease.

At all times material to this action the company remained in possession and occupation of the premises, and the second defendant resided in the flat, as she was entitled to do by the express provisions of this lease. She was also guarantor of due performance by the lessees of their covenants. It is tolerably clear, from the terms of the lease, and it became clearer when the termination of the lease came into sight, that it was expressly designed to ensure for the landlord that, at the expiration of the lease, he should have as lessee a limited liability company which would not be able to claim the protection of the Rent Restriction Acts in answer to any proceedings by him to obtain possession.

It is conceded that by reason of their rateable value these premises are within the Rent Restriction Acts. In 1946, when the end of the lease was coming into sight, the lessees, by their solicitors, wrote this letter, dated March 8, to the landlord: "Our clients, K. Carter, Ld., are proposing to assign their lease "of the above flat to Mrs. Kate Bowman who is, as you know, "the principal shareholder and a director of the company and "is already a guarantor of the company's obligations under the "lease. Your licence is, of course, necessary to the assignment, and we shall be glad to know that it will be forthcoming. "Please accept this letter as our undertaking to pay your "solicitors' charges in connexion with the matter." The correspondence continued, but the landlord refused to give his consent. The subject dropped until, on January 17, 1947, the company's solicitors gave the names of several people as references for the second defendant, said that the company desired to assign the lease to her, and added: "We understand "that application for this assignment was made to you in March "1946, and that you then refused to give your consent. "As Mrs. Bowman's references are of the highest character, "we must point out that under the terms of the lease your "consent cannot be unreasonably withheld, and we shall be "glad if, in view of our letter, you will reconsider the matter "and give your licence for this assignment."

The reply dated January 20, was: "We have already "written to your clients, Messrs. K. Carter, Ld., reminding "them that their lease of the above premises expires at Lady "Day next, and requesting them to make the necessary "arrangements to give up possession of the premises as at "that date. In view of this, our client is not prepared to give "his consent to the assignment of the lease to Mrs. Kate "Bowman, and as you are now acting for Messrs. K. Carter, "Ld. perhaps you will kindly let us know that your clients are "making the necessary arrangements to vacate the premises on "the expiration of the lease." Consent to the assignment was not forthcoming, but on January 27 the company purported to assign the lease to the second defendant, and they sent the assignment to the landlord with a guinea as registration fee, which the landlord returned.

The facts were not in dispute, and although in the correspondence the landlord had not clearly indicated the precise reason for his refusal, except that the lease was coming to an end in the near future and that he had written indicating his desire to have possession of the premises at the end of the lease, it was agreed at the hearing before the county court judge by counsel on both sides that the reason for the landlord's refusal was that he wished to prevent a statutory tenancy from arising as a result of his accepting the second defendant as the assignee. The position would then have been that, at the expiration of the lease in March, 1947, he would have been faced with a tenant in actual occupation of the premises which were partly used as a dwelling-house; and that, provided that she continued to comply with the conditions of the tenancy, he would not be able to evict her except for one or other of the special reasons contained in the Rent Restriction Acts; whereas, if the company remained his tenants, nothing could prevent him from obtaining possession of his own property at the end of the lease. That was the reason, and the whole question in the case is whether his refusal on that ground was reasonable or unreasonable.

The judge, having had all the relevant authorities cited to him, came to the conclusion that the landlord was not unreasonable in withholding his consent on that ground, that accordingly the purported assignment was unlawful, and that the landlord was entitled to possession. In his "Reasons for

"Judgment" he said: "I held that the defendant company "had no right to assign to the second defendant, and that the "landlords were within their legal rights in refusing to consent "to such assignment. The premises let to the company "were not controlled by the Rent Acts in view of those "defendants being a limited company, whereas the second "defendant Bowman was a person who, if she became tenant, "would be protected by the Acts and the whole nature of the "tenancy would be changed. I held that the objection by the "landlord to the assignee in the present case was reasonable "within the principles of *Houlder Brothers & Co.* v. *Gibbs* (1) "and *Tredegar* v. *Harwood* (2)."

It must be remembered at the outset that, as was stated by Warrington L.J. in *Houlder Brothers & Co.* v. *Gibbs* (3): "The "question whether a particular act is reasonable or "unreasonable is obviously one that cannot be determined on "abstract considerations. An act must be regarded as "reasonable or unreasonable in reference to the circumstances "under which it is committed." I quote that observation because I think that it requires to be borne in mind, in approaching this and all other cases where the question is whether or not the withholding of consent was in the particular circumstances reasonable or unreasonable, that the answer must in every case depend upon the facts of the particular case. The facts of the present case which I wish to emphasize are these: at the time of the purported assignment, and at the time of the previous application for consent in March, 1946, the second defendant was residing in and occupying and having the full benefit of this flat. The company were the lessees under the lease. Those conditions would have continued in any event—there was nothing to prevent their continuing—for three months more until March, 1947, so that if an assignment took place in January no practical benefit from that date until March 25, 1947, would result to the second defendant. In any event she would have remained entitled to be where she was, in that flat, and the company would have remained lessees of it. The result of this assignment, however, would be to alter the legal relationship between the second defendant and the landlord, and to put her in the position of a tenant, with the result that at the end of the lease in March, 1947, the landlord would have been unable to enforce cl. 2 (18.) of the lease containing the tenant's

(1) [1925] Ch. 198, 575.
(2) [1929] A. C. 72.
(3) [1925] Ch. 584.

covenant to give up possession at the termination of the lease. Furthermore, at the termination of the lease he would have found himself faced with a statutory tenant who could only be evicted for the special reasons specified in the Rent Restriction Acts. It is obvious that that was the whole reason for the purported assignment, and in those circumstances the landlord refused to give his consent.

It is argued that the county court judge's decision was erroneous because he had not applied the principles laid down by Tomlin J. in *Houlder Brothers & Co.* v. *Gibbs* (1). The headnote (in the Law Reports) states: "In a lease for years "the lessees covenanted not to assign the premises, or any part "thereof, without the consent in writing of the lessor, such "consent not to be withheld unreasonably in the case of a "respectable and responsible person or corporation. The "lessees agreed to assign the premises, subject to the consent "of the lessor, to R., Ld., who were in possession of adjoining "premises on a yearly tenancy from the same lessor. The "lessor refused to give his consent to the assignment on the "ground that he would lose good tenants of the adjoining "premises, and would have great difficulty in re-letting them: "Held, that the licence had been unreasonably withheld, and "that the lessees were free to assign. Grounds of objection "unconnected with the person of the assignee or the user or "occupation of the premises are not reasonable. Dicta "tending to the contrary not followed."

Tomlin J. reviewed all the relevant authorities down to that time and summed them up as follows (2): "The question is "what I am to make of all that. I come to the conclusion "that the principle as stated—and I hope I am not disrespectful "in putting it this way—by A. L. Smith L.J. in *Bates* v. "*Donaldson* (3) is accurately stated, and when he said what "he did say, he meant what he said, and that it is by reference "to the personality of the lessee or the nature of the user or "occupation of the premises, that the court has to judge of the "reasonableness of the lessor's refusal. It is quite true that "the injury threatened or apprehended to the lessor may be in "respect of something which has nothing to do with the lease "of the demised premises; it may be in relation to other "property of which he is the owner, but the danger must "come from the nature of the user or occupation or from the

(1) [1925] Ch. 198.
(2) Ibid. 209.
(3) [1896] 2 Q. B. 241.

"personality of the assignee. In the present case what is the "real reason of the refusal? The real reason is not one which "had anything to do with the personality of the lessee, or with "the user or occupation of the premises; the real reason is that "the lessor wants to prevent the assignee from giving up other "premises of which he is also lessor; in other words, his real "purpose in refusing an assignment is not in relation to the "demised premises at all, but in relation to other property, "and to bring pressure to bear on the assignee not to give up a "tenancy of different premises belonging to him." Once again, it is necessary, I think, to emphasize that that language must be considered in the light of the facts of the particular case which the judge was considering. I do not think for one moment that he was purporting to lay down some principle of universal application which would cover every conceivable case, and it is abundantly clear that he had not in his mind any such situation as that which has arisen here, in relation to the results which might follow at the end of the lease from the acceptance of a particular assignee.

The Court of Appeal upheld the decision of Tomlin J. and approved his reasoning; but all the members of the court put the matter in their own words in the course of their judgments and used language to which I think it necessary to refer having regard to the emphasis that Mr. Lawson has laid on the exact words used by Tomlin J. Pollock M.R. (1) said, after discussing *Bates* v. *Donaldson* (2): "For my part, I agree "with A. L. Smith L.J., and I think that one must look at these "words in their relation to the premises, and to the contract "made in reference to the premises between the lessor and "lessee; in other words, one must have regard to the relation "of the lessor and lessee inter se, or, perhaps one may add, to "the due and proper management of the property, as in "*Bridewell Hospital Governors* v. *Fawkner* (3). The latter "case is an illustration of a withholding of consent on broad "grounds bearing upon the estate of the lessor, or it may be on "grounds which are important between the lessor and other "lessees of that property, or that estate, of which the lessee "had cognizance. But I do not think the words of the "covenant can be so interpreted as to entitle the lessor to "exercise the right of refusal when his reason given is one "which is independent of the relation between the lessor and

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(1) [1925] Ch. 583.

(2) [1896] 2 Q. B. 241.

(3) (1892) 8 T. L. R. 637.

"lessee, and is on grounds which are entirely personal to the "lessor, and wholly extraneous to the lessee."

Warrington L.J. after the passage already quoted, went on (1): "Now, what is to be inferred from what may be treated "as having been in the contemplation of the parties when the "contract was made? I think it must be, as I have said, that "it was intended to protect the lessor as against a lessee, who, "although respectable and responsible, might well be "reasonably objectionable in other ways, and, secondly, from "the point of view of the property, to prevent the lessor from "having to accept a lessee whose user of the property might "again be reasonably objectionable."

Sargant L.J. said (2): "In the present case Mr. Stamp "has shown in his able argument that it is not necessary "for the success of the respondent that the operation of the "covenant should be limited even to the extent laid down by "A. L. Smith L.J.; because Mr. Stamp points out that not "only is the reason given here something that is not in relation "to the use or occupation of the premises, or to the personality "of the tenant, but that the reason has nothing whatever to "do with the subject matter of the demise. I was very much "impressed by his argument that in a case of this kind the "reason must be something affecting the subject matter of the "contract which forms the relationship between the landlord "and the tenant, and that it must not be something wholly "extraneous and completely dissociated from the subject "matter of the contract." In the concluding words of his judgment he said: "In the present case the reason for "refusing has nothing whatever to do with the relationship of "landlord and tenant in regard to the subject matter of the "demise. The sole reason is that if the property is allowed "to be assigned to the new tenants, the new tenants, in respect "of a tenancy of a completely different property which they "hold from the lessor, will probably desire to terminate their "tenancy of that other property."

I have quoted those observations at some length for the purpose of showing that all the four judges concerned in that case expressed their views in somewhat differing language. For myself, I think that the present case comes within the words used by them all, and that here the refusal to give consent was connected with the person or personality of the proposed assignee and directly affected the subject matter of the contract.

(1) [1925] Ch. 585.

(2) Ibid. 587.

It is true that the consequences would not show themselves until the expiration of three months from the date of the assignment, and Mr. Lawson is right when he says that the contractual relationship would have remained the same had the landlord consented to the assignment ; but it was a contractual relationship pregnant with future possibilities, or more than possibilities, which would not have resulted from the previous existing contractual relationship between the landlord and the company.

In *Tredegar* v. *Harwood* (1) some doubt was expressed by Lord Dunedin and Lord Phillimore with regard to the precise language that had been used by Tomlin J. I need not refer to what was said on the subject because *Houlder Brothers & Co.* v. *Gibbs* (2) still remains a binding authority upon this court.

I must refer to a recent decision, much relied upon by Mr. Lawson, of Evershed J. in *Hill* v. *Swanson* (3). In that case the questions were raised by an originating summons : (1.) whether according to the true construction of the said agreement and in the events which had happened the refusal of the defendant to grant a licence to the plaintiff to assign the premises was unreasonable and (2.) whether, notwithstanding such refusal, the plaintiff was at liberty to assign the premises without any such licence. Evershed J. eventually came to the conclusion that at the time of the assignment in question the contractual tenancy was not subsisting. Therefore, the question whether consent to the assignment could or could not be reasonably withheld did not really arise, and everything that Evershed J. said in his judgment on that part of the case was really obiter. None the less he discussed the question at some length. It is necessary to observe that in that case, assuming the contractual tenancy to have been subsisting, the proposed assignor was a person who, if he had remained the tenant, would have become a statutory tenant at the termination of the agreement, and that the proposed assignee was in a similar position. The tenant, the assignor, was minded to go out and to assign to the tenant who would come in. The landlord desired to obtain possession of the premises when his tenant went out, and preferred to have possession rather than a statutory tenancy, which would result from the assignment. Therefore, the landlord's real objection to the assignment, if there had been a contractual tenancy subsisting, was that he would thereby have been deprived of his opportunity of getting possession

(1) [1929] A. C. 72.

(2) [1925] Ch. 575.

(3) 62 T. L. R. 719.

of the premises before the expiration of the lease. That would have made the case almost identical with *Bates* v. *Donaldson* (1); there A. L. Smith L.J. held that that was not a good reason for a landlord to refuse consent to the assignment. For those reasons I do not think that the observations of Evershed J. on this point in *Hill* v. *Swanson* (2) are conclusive in any way of the matter which comes before us. On the facts of that case, assuming a subsisting agreement, the reasons for the landlord's refusal were unreasonable having regard to the decision of *Bates* v. *Donaldson* (1). If the observations of Evershed J. go beyond that and are inconsistent with the view which I take of the present case, then I must respectfully differ from him; but I think that that case was an altogether different one from this.

I think that this appeal fails and that the decision of the county court judge on the particular facts of this case was correct.

BUCKNILL L.J. I agree that the appeal should be dismissed, for the reasons given by my Lord.

SOMERVELL L.J. I agree. Mr. Lawson, in order to succeed in this appeal, must show that the judge misdirected himself in what was primarily clearly a question of fact. I think that he sought to do that by submitting that the county court judge had decided that the landlord was reasonable in refusing his consent by taking into account matters which, as a matter of law, he was not entitled to take into account. He submitted, as I understood him, that the question what would happen when the tenancy came to an end was wholly irrelevant and, as a matter of law, could not be relied upon by the landlord as showing that he was reasonable in what he did.

I only want to make it clear that I am not suggesting that there is any principle on which, in all cases and in all circumstances, a lease originally granted to a company may not be assigned by that company to an individual, or, to put it more accurately, that the landlord would always be held to be reasonable if he refused his consent to such an assignment.

To the quotations by my brother Tucker from *Houlder Brothers & Co.* v. *Gibbs* (3) I add a reference to a sentence at the end of the judgment of Pollock M.R., beginning:

(1) [1896] 2 Q. B. 241.
(2) 62 T. L. R. 719.
(3) [1925] Ch. 584.

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"While I think it is impossible to give an exact definition "which will fit all cases . . . ." That observation is particularly applicable to the sort of subject matter with which courts may be concerned in deciding issues under covenants of this kind in a lease; and, like my brother, I think it a most important and relevant circumstance that the assignment to which the landlord was asked to assent lacked the normal circumstance, namely, that the lessee no longer desires the use of the premises and has found someone anxious to occupy them. The circumstances here were exceptional, for the proposed assignee, as she stated in her affidavit, had from March 25, 1940, in accordance with the provision in that behalf contained in the lease, occupied the flat and used it as a private residence for herself and her family.

I agree with and I do not with to add anything to what my brother has said with regard to the law. In my opinion, the circumstances which clearly actuated the landlord's mind were ones which the county court judge was entitled to consider in deciding whether or not the landlord acted reasonably. The matter was one of fact, and the county court judge, as it seems to me, applied correct principles of law. Therefore the appeal must fail.

TUCKER L.J. A further question has now arisen with regard to the costs. The landlord by a writ issued on October 29, 1947, in the High Court was claiming possession of certain premises which had been let to the company under a lease which expired on March 25, 1947. Mrs. Bowman, who claimed to be in occupation of the premises by virtue of an assignment from the company, was added as a defendant. That assignment is referred to in the statement of claim, and the whole case for the landlord was that it was an unlawful assignment, in contravention of the lease, and one to which he had refused his consent. If all that was correct, then both defendants were at the time of the issue of the writ trespassers. On the other hand, if the contention of the defendants was correct, if the company had lawfully assigned the premises to the second defendant, then, at the material time, the premises in question being partly a dwelling-house, and the second defendant being in occupation and being ready and willing to perform the terms of the original lease, she was protected by the Rent Restriction Acts in view of the rateable value of the premises.

It is to be observed that the landlord originally alleged in

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his statement of claim: "The flat is not one to which "the Rent and Mortgage Interest Restriction Acts, 1920–"39, apply, as the rateable value on the appropriate "day exceeded 100*l.* per annum." Apparently, when the inaccuracy of that statement had at some time been discovered, the writ was amended and those words were struck out. The case came before the master under a summons for judgment under Order 14, and the second defendant put in an affidavit setting up that she was entitled to possession under the Rent Restriction Acts and claiming that there had been a lawful assignment to her by reason of the unreasonable refusal of the landlord to give his consent. On the hearing of that summons the master, without any opposition, I understand, from either side, made an order remitting the action to the county court. The county court judge decided the case in favour of the landlord, giving him judgment for possession, which judgment we yesterday upheld. The judge gave the landlords costs on the High Court scale down to the date when the action was remitted.

It is argued by counsel for the defendants that the county judge court had no jurisdiction to make that order with regard to High Court costs. He relies on s. 17, sub-s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, whereby "A county court shall have jurisdiction to deal with any claim "or other proceedings arising out of this Act or any of the "provisions thereof, notwithstanding that by reason of the "amount of claim or otherwise the case would not but for this "provision be within the jurisdiction of a county court, and, "if a person takes proceedings under this Act in the High Court "which he could have taken in the county court, he shall not "be entitled to recover any costs." By s. 48 of the County Courts Act, 1934: "A county court shall have jurisdiction to "hear and determine any action for the recovery of land where "neither the value of the land in question nor the rent payable "in respect thereof exceeds the sum of one hundred pounds "by the year." The rent in the present case was 275*l.* a year, and, accordingly, the county court would have had no jurisdiction under s. 48 of the Act of 1934. Mr. Plume, for the landlord, on being asked whence the county court derived the jurisdiction to give the judgment which has been upheld, answered that it was from s. 17, sub-s. 2 of the Act of 1920. If he is right, then, I think, he must fail with regard to the costs in the High Court, because that same sub-section, which gives the county court a jurisdiction which it would not otherwise have had, deprives a party who takes such proceedings in the High Court, on the assumption that they could have been begun in the county court, of his right to recover any costs.

Mr. Plume argues very ingeniously that the county court derived its jurisdiction from the first two lines of that subsection, but that its last three lines do not apply to this case. The sub-section begins: "A county court shall have juris-"diction to deal with any claim or other proceedings arising "out of this Act or any of the provisions thereof." Mr. Plume argues that, when the landlord started his proceedings, the county court had no jurisdiction by reason of the amount of the rent of the premises, but that, as soon as he came before the master and the second defendant put in her affidavit setting up the Rent Restriction Acts, the claim became one arising under the Acts. Accordingly the master thereupon had jurisdiction to remit the action and the county court had jurisdiction to entertain it. With regard to the concluding words of the sub-section, "and, if a person takes "proceedings under this Act in the High Court which he could "have taken in the county court, he shall not be entitled to "recover any costs," he argued that, although the county court derived jurisdiction as soon as the second defendant had produced an affidavit, it was not an action which could have been begun in the county court originally.

I am unable to accept that argument. I do not think that jurisdiction can depend upon the precise stage at which a defendant raises his defence. It was known at all times before the date of the writ what isssue was being raised by the second defendant: that appears from the statement of claim indorsed on the writ. It was made clear long before that, namely, on January 30, 1947, when the second defendant's solicitors wrote: "We regret that we cannot agree that the reasons for "your client's refusal to consent to this assignment are "reasonable. The company being the original lessees will "remain liable for the payment of the rent, despite the assign-"ment, and if your client so desires, Mrs. Bowman [the second "defendant] will enter into a direct covenant with him as "provided in the lease. Accordingly the assignment has now "been made and we enclose the original assignment together "with our cheque for one guinea, the registration fee payable, "and shall be glad if you will kindly return the assignment "duly registered together with your receipt for the fee paid "as soon as possible." It is clear that it had been always realized by the landlord that the whole object of this assignment was to endeavour to give the protection of the Rent Acts to the second defendant. In fact, that was the reason for his refusal to give his consent; so it was no surprise to him to find, before the master, that this issue had been raised by the second defendant. Accordingly, I think that if Mr. Plume is right in saying that the county court did derive jurisdiction from s. 17, sub-s. 2 of the Act of 1920, he cannot now be heard to say that the consequential provisions of that sub-section with regard to costs do not apply.

For those reasons I think that the submission with regard to costs made by the defendant is correct. I do not think it necessary to give a final decision whether or not the county court would originally have had jurisdiction under s. 17, sub-s. 2. My decision rests on the fact that the landlord, having chosen to take this course, having chosen to uphold a judgment which, he says, can only be upheld by virtue of the jurisdiction conferred by s. 17, sub-s. 2, cannot now be heard to say that that sub-section does not apply with regard to the costs of these proceedings incurred in the High Court.

For these reasons I do not think it necessary in the present case to express any opinion with regard to the difficult questions which have been discussed, or to refer to the authorities such as *Russoff* v. *Lipovitch* (1), *Joslowicz* v. *Burstein* (2), and *Gunter* v. *Davis* (3), which concern proceedings for the recovery of premises brought against persons who are trespassers, cases in which the landlord does not seek to rely on any of the provisions of the Rent Restriction Acts in order to get possession. It is not necessary to decide the extent to which those authorities apply to the facts of this particular case, or whether they are applicable. I think that this case depends on the particular course which was taken before the order remitting the proceedings to the county court.

BUCKNILL L.J. I agree, and will only add one word on the doubt which was raised by Atkin L.J. in *Russoff* v. *Lipovitch* where he says (4): "I desire to add that I propose to reserve "consideration of the question that arose in *Gunter* v. *Davis* (3), "whether proceedings against a mere trespasser, who has "never filled the position of tenant or sub-tenant, for the

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(1) [1925] 1 K. B. 628.
(2) [1948] 1 K. B. 408.
(3) [1925] 1 K. B. 124.
(4) [1925] 1 K. B. 640.

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"recovery of possession of a house to which the Act applies are "proceedings arising out of the Act." It seems to me that it cannot possibly be said that the second defendant here was a trespasser: not only did the landlord agree that the use of the flat as a residence by her and her family was not to be deemed a breach of the convenant not to assign without the lessor's previous consent in writing, but she did in fact get an assignment from the tenant which was valid in every respect except that the landlord's consent in writing had not been previously obtained. Therefore, I do not think that this case falls within the class in respect of which Atkin L.J. expressed that doubt.

SOMERVELL L.J. I agree.

TUCKER L.J. The order of the judge will be varied by striking out that part of it in which he gave costs on the High Court scale down to the date of remission. There will be substituted an order that there be no costs before that date. With regard to this appeal the successful landlord will have his costs less the sum of five guineas.

Solicitors for the landlord: *Simon, Haynes, Barlas & Cassels.*
Solicitors for the defendants: *H. B. Supperstone & Co.*

R. C. C.

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June 9.
Tucker, Somervell and Cohen L.JJ.

BALDWIN *v.* GURNSEY.

Landlord and Tenant (Emergency Legislation)—Registration of accommodation in dwelling occupied by person registering—Nature of requisite occupation—Operation of Rent Restriction Acts excluded by registration—Right of tenant to challenge validity of registration in proceedings by landlord for possession—Defence Regulations, reg. 68CB (1), (6).

Regulation 68CB of the Defence Regulations provides by para. (1) for the registration of accommodation which a person has "in any dwelling . . . . occupied by him" and is willing to make available for tenants. By para. (6) accommodation registered and let in accordance with the registered terms and conditions is excluded from the operation of the Rent Restriction Acts in respect of that letting.

On February 14, 1946, a landlord agreed to let three rooms in her house to a tenant if she (the landlord) obtained a certain post abroad. On February 22 she registered those rooms under reg. 68CB of the Defence Regulations as available for occupation by tenants. The landlord obtained her post abroad, and the tenant went into occupation of the rooms on March 6. The landlord at all material times had furniture in all the rooms in the house other than the three rooms in question. On a claim by the landlord for possession after expiry of due notice to quit, the tenant claimed the protection of the Rent Restriction Acts, contending that the registration was invalid in that the rooms were not " occupied " by the landlord, as required by para. (1) of reg. 68CB, when she registered them, and that only a letting subsequent to registration was excluded from the operation of the Rent Restriction Acts by para. (6).

Held (1) (per TUCKER and SOMERVELL L.JJ.) that the presence of the landlord's furniture in part of the house gave her occupation of the three rooms in question for the purposes of registration under reg. 68CB; (2) (per TUCKER and COHEN L.JJ.) that in any event the contention that the registration was invalid and para. (6) of the regulation accordingly inapplicable to the premises was not open to the tenant so long as the premises were in fact on the register; and (3) that, as the agreement entered into before registration had been subject to the landlord's obtaining her post abroad, no agreement was in fact entered into until after the registration of the premises when the landlord ascertained that she had in fact obtained the post. Paragraph (6) was accordingly applicable, and the landlord was entitled to possession.

Per TUCKER L.J.: The registration (and, therefore, para. (6) of the regulation) would not have been effective to exclude the premises from the Rent Restriction Acts if the premises had in fact been let to the tenant before registration.

Per SOMERVELL L.J.: *Quaere*, whether, if it could be shown by proper evidence that the registration was irregular, the tenant could set up the irregularity in proceedings by the landlord for possession, or whether he would have first to take other proceedings for removal of the premises from the register.

APPEAL from Swansea county court.

The plaintiff landlord was contemplating going to Germany, where she hoped to obtain a position under U.N.R.R.A. She was therefore willing for a short period to let part (three rooms including a bedroom and kitchen) of the dwelling house known as Longlands, Kingsbridge, of which she was the owner. Accordingly, she availed herself of reg. 68CB (1) of the Defence

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(1) Defence Regulation 68CB, para. (1): " Where a local housing " authority have established a " register for the purposes of this " Regulation, any person having in " any dwelling in the area of the " authority occupied by him living " accommodation which he is

Regulations and duly registered the rooms in question under it. On February 14, 1946, before she actually registered the rooms, she agreed to let to the tenant by the lunar month the accommodation now occupied by her. That agreement was, however, subject to the landlord's receiving an appointment with U.N.R.R.A. When she received her appointment she confirmed the agreement. The landlord registered the premises on February 22, 1946. The rooms subsequently let to the tenant were unoccupied on February 23, 1946. The landlord went abroad in March, 1946. The tenant went into occupation on March 8, 1946.

On May 27, 1947, the landlord gave the tenant notice to quit on June 30, 1947. The tenant refused to vacate the rooms, and the landlord brought this action for possession. The tenant in her defence claimed the protection of the Rent Restriction Acts.

The county court judge held that the registration of the premises was valid, that para. (6) of reg. 68CB applied and excluded the operation on the tenancy of the Rent Restriction

"willing to make available, "whether with or without furni- "ture for use therein, for "occupation by tenants or lodgers, "may apply to the authority for "registration of the accom- "modation and of the terms on "which the householder is willing "to make it available as afore- "said.

Paragraph (2): "On appli- "cation being made under the "last foregoing paragraph the "local housing authority shall, if "they are satisfied that the accom- "modation is, or will be rendered, "suitable for occupation as afore- "said and approve the said "terms, enter the accommodation "and terms in the register, "together with any conditions as "to the number of persons to "occupy the accommodation, the "use of furniture or other facilities "or otherwise as the authority "may think requisite: Provided "that the authority shall not be "required to register any accom- "modation, and may cancel the "registration of any accom- "modation, if it appears to them "that it would be likely to "be made available for "accommodation as aforesaid "without being registered under "this regulation."

Paragraph (6): "No accom- "modation registered for the "purposes of this regulation which "has been let in accordance with "the registered terms and con- "ditions shall, as respects that "letting, be treated as a dwelling- "house to which the Rent and "Mortgage Interest Restrictions "Acts, 1920 to 1939, apply; and "in determining for the purposes "of those Acts the standard rent "of any dwelling-house no regard "shall be had to any such letting "of such accommodation."

Acts, and that the landlord was accordingly entitled to possession. The tenant appealed.

Victor Ruston (*Stephen Benson* with him) for the tenant.
Morgan Blake for the landlord.
The arguments sufficiently appear from the judgments.

TUCKER L.J. The whole question is whether these premises are, in respect of the tenancy in question, taken out of the protection of the Rent Restriction Acts by their registration under reg. 68CB.

The first point taken for the tenant is that at the time when the premises were registered by the landlord she was not in occupation of them because the evidence showed that the only occupation which she then had was that the remaining rooms in the house were filled with her furniture. The accommodation in the house consisted of three rooms upstairs and three rooms downstairs: there were the rooms which were let to the tenant subsequently, and the other rooms used by the landlord for her furniture. It is argued that this procedure for registration can only properly take place when the person seeking to register is physically in occupation of the premises. In my view that argument is not open to the tenant so long as the registration which has in fact taken place subsists and has not been cancelled. I think that para. (6) of this regulation applies so long as there is in force a registration, and that the only way to get rid of a registration if it is not properly made would be to take the requisite proceedings under the regulation to have it cancelled.

However that may be, I think that in any event the presence of the landlord's furniture in these rooms would, for the purposes of this regulation, amount to an occupation to satisfy para. (1). I do not think that the kind of occupation envisaged by the regulation is the same as the physical occupation required of a tenant claiming the protection of the Rent Restriction Acts. This regulation concerns householders and gives certain powers to the local authority. I think that the word " occupied " refers to the same kind of occupation as is required for rating purposes.

The next point taken for the tenant was that in any event, on its proper construction, para. (6) only succeeds in excluding the Rent Restriction Acts if the letting in question is subsequent to the registration. He says that, on the true view of this case, the landlord had in fact let the premises to the tenant before she registered them. I think that, if that were so, the tenant would succeed; but the difficulty is that the expression

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"letting" depends entirely on the evidence of the landlord and the tenant with regard to the conversations which had taken place between them, there being nothing in writing. On that evidence, the judge's finding of fact that there was a provisional agreement before the registration and that it was made subject to the landlord's obtaining an appointment puts the tenant out of court on that part of his appeal. I think that the appeal fails.

SOMERVELL L.J. I agree. I base my conclusion solely on the ground that the premises were occupied by the landlord within the meaning of reg. 68CB, para. (1). My brother TUCKER referred to the question, which was also argued, whether, if the premises are, as a matter of writing, on the register, they can be the subject of dispute in proceedings inter partes such as these. I express no opinion on that. I would like to reserve the question whether, if it could be shown by proper evidence that the registration was irregular, the tenant might be able to make that point in proceedings of this kind, or whether he would have first to take other proceedings to have the premises removed from the register.

COHEN L.J. I prefer to base my reason for rejecting the tenant's argument solely on the ground that in my view, so long as the certificate of registration remains in force, the tenant cannot evade the effect of para. (6) of the regulation. I am not dissenting in the least from the view which my brothers have formed on para. (1); but I have not come to a conclusion about this question and prefer to reserve my view on it until it is necessary to decide it.

So far as the second point is concerned, the only fair reading of the judge's judgment is that he took the view that no binding agreement was intended to take place between the parties before the registration. The landlord stated quite plainly that she told the tenant that she was registering the rooms with the local authority. If she did that, that is wholly inconsistent with any binding agreement before she had done so.

Appeal dismissed.

Solicitors for the landlord: *Rhys Roberts & Co. for Myer Cohen & Co., Cardiff.*

Solicitors for the tenant: *John B. Purchase & Clark, for D. O. Thomas & Co., Swansea.*

R. C. C.

MORGAN & SON, LIMITED *v.* S. MARTIN JOHNSON & COMPANY, LIMITED.

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June 3.

Tucker and Cohen L.JJ.

Practice — Specially indorsed writ — Claim for storing vehicles — Equitable defence—Right to unconditional leave to defend—R. S. C. Or. 14.

The plaintiffs by specially indorsed writ claimed from the defendants a certain sum for the storage of vehicles. The defendants by their affidavit acknowledged that the sum claimed would have been due but for the fact that the plaintiffs had negligently either delivered one of the vehicles to the wrong person or allowed it to be stolen. The judge in chambers gave the plaintiffs leave to sign judgment for the amount of their claim, but granted a stay of execution pending trial of the counterclaim. On the defendants' appeal,

Held, that, as the facts set out in the defendants' affidavit would have supported a claim to an equitable set off against the plaintiffs' claim, the judge should have given the defendants unconditional leave to defend the action, and should not have allowed the plaintiffs to sign judgment.

Quaere the right form of order in the case of a counterclaim not disclosing a right to equitable set-off.

Per COHEN L.J. To hold the defendant in an action for non-delivery of goods entitled to equitable set-off in respect of a counterclaim for libel would be inconsistent with the observations of Lord Cottenham in *Rawson* v. *Samuel* (1839) Cr. & Phil. 161.

Piggott v. *Williams* (1821) 6 Madd. 95 applied.

Order of Lynskey J. reversed.

APPEAL from Lynskey J. in chambers.

By specially indorsed writ, the plaintiffs, Morgan & Son, Ld., claimed from the defendants, C. Martin Johnson & Co., Ld., "353*l.* 3*s.* 0*d.* being as to 352*l.* 17*s.* 0*d.* the plaintiffs' charges "for open storage accommodation" [for vehicles of the defendants] "provided by the plaintiffs . . . ."

An affidavit sworn by the secretary to the defendant company stated: "I admit that the plaintiffs stored vehicles for the "defendants and that but for the matters hereinafter referred "to the sum of 353*l.* 3*s.* 0*d.* would be due from the defendants "to the plaintiffs, but I say that the plaintiffs in breach of the "terms of the said contract and further or alternatively in "breach of their duty as bailees of the defendants of a certain "Dodge vehicle Job No. 86 either delivered up the said vehicle "to someone without the authority of the defendants and "without either the signature or the collection order referred "to in" [a] "letter dated May 12, 1947, or, alternatively, kept "so inefficient a watch on the said vehicle that it was stolen. "In consequence the said vehicle has been wholly lost to the "defendants and the value thereof is approximately 375*l.*"

Lynskey J., affirming, with a slight amendment, the order of the master, gave the plaintiffs leave to sign judgment for the sum claimed, but granted the defendants a stay of execution pending trial of their counterclaim or until further order. The defendants now appealed.

Leon for the defendants.

Hale for the plaintiffs.

The arguments appear sufficiently from the judgments.

TUCKER L.J. It is conceded that the defendants' claim had been put forward some time before the writ was served, and that it was a bona fide claim which had to be investigated. Questions will arise at the trial as to the nature of the duty owed and the circumstances in which the motor car disappeared, and whether or not the plaintiffs are liable; but it was clearly a bona fide claim arising out of the subject-matter of the plaintiffs' claim for storage, and closely interwoven with it.

The effect of the order which the judge made, one very often made in cases of this kind, was to give the plaintiffs judgment for the amount of the claim, but to stay execution pending the trial of the defendants' counterclaim. Ordinarily speaking, such an order as made here will adequately protect the defendants in a case of this kind, and I find it a little difficult to follow the precise reasons which their counsel has advanced for the objection to this particular order. None the less, if it was a wrong order, he is entitled to take the point. Any litigant is entitled to prefer not to have a judgment subsisting against him even if he is adequately protected from any premature enforcement of that judgment, and that is the point which counsel takes. In my view, it all comes down to this: in circumstances such as the present, would a court of equity have granted relief by way of equitable set-off in proceedings where both claim and what for convenience I call counterclaim were pending before that court? It is not necessary to consider, as at one time it appeared to be, what the position would have been in a court of equity where the counterclaim, so to speak, was proceeding in that court and the claim was proceeding in the King's Bench Division, or what course a court of equity would have taken for the protection of the plaintiff in his action

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in the Chancery Division with regard to proceedings which might be going on in the other division. It is sufficient for this case to ascertain what a court of equity would have done where both claims were pending before the Chancery Court.

It is conceded by Mr. Hale for the plaintiffs, on the authorities which have been relied upon by Mr. Leon, that he cannot contend that, in circumstances such as the present, the court of equity would not have allowed the defendants' claim by way of equitable set-off. Since the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, of course, all the courts must give effect to equitable relief which would have been given by a Court of Chancery. Sections 38, 39 and 40 of the Act of 1925 are those relevant. Section 38 provides: "If a "defendant claims to be entitled to any equitable estate or "right, or to relief on any equitable ground against any deed, "instrument or contract, or against any right, title or claim "asserted by any plaintiff or petitioner in the cause or matter, "or alleges any ground of equitable defence to any such claim "of the plaintiff or petitioner, the court or judge shall give to "every equitable estate, right or ground of relief so claimed, "and to every equitable defence so alleged, the same effect by "way of defence against the claim of the plaintiff or petitioner, "as the Court of Chancery ought formerly to have given if the "like matters had been relied on by way of defence in any suit "or proceeding instituted in that court for the like purpose." By s. 39, sub-s. 1: "The court or judge shall have power to grant "to any defendant in respect of any equitable estate or right "or other matter or equity, and also in respect of any legal "estate, right or title claimed or asserted by him—(*a*) all such "relief against any plaintiff or petitioner as the defendant has "properly claimed by his pleading, and as the court or judge "might have granted in any suit instituted for that purpose by "that defendant against the same plaintiff or petitioner . . .".

By s. 40: "The court or judge shall take notice of "all equitable estates, titles and rights, and all equitable duties "and liabilities appearing incidentally in the course of any "cause or matter, in the same manner in which the Court of "Chancery would formerly have taken notice of those matters "in any suit or proceeding duly instituted therein." By s. 41: "No cause or proceeding at any time pending in the High Court "or the Court of Appeal shall be restrained by prohibition or "injunction, but every matter of equity on which an injunction "against the prosecution of any such cause or proceeding might

" formerly have been obtained, whether unconditionally or on " any terms or conditions, may be relied on by way of defence " thereto: Provided that—(*a*) Nothing in this Act shall disable " either of the said courts, if it thinks fit so to do, from directing " a stay of proceedings in any cause or matter pending " before it . . ." That indicates that a matter in respect of which an injunction might have been obtained before the Act was passed now becomes a matter of defence.

I do not think it necessary, in view of Mr. Hale's admission as to the effect of the authorities, to refer to all the cases cited by Mr. Leon. *Bankes* v. *Jarvis* (1) was an action to recover a debt due to the plaintiff as a trustee, and it was held that the defendant was entitled to set up as a defence that the cestui que trust was indebted to him in a sum for unliquidated damages exceeding the amount of the claim. The facts were that one Bankes had carried on practice as a veterinary surgeon. Before going abroad he gave to the plaintiff, his mother, authority in writing to sell the practice. That she did, together with the goodwill, fixtures and fittings, to the defendant for 100*l*., payable in two instalments. The action was brought for the second instalment under that agreement. " The claim " the report states (2) " was not disputed, but the defendant counter- " claimed 51*l*. as damages for breach by Vernon Bankes of his " covenant to indemnify the defendant, being 21*l*. for rent which " the defendant had been compelled to pay through the default " of Vernon Bankes, and 30*l*. paid by the defendant in settle- " ment of a claim for damages for breach by Vernon Bankes of " the covenant to repair." Lord Alverstone C.J. in his judgment said (3): " The action was, however, brought by the " mother as agent or trustee for her son, and the case, therefore, " raises the simple question whether the defendant can set up " as a defence the claim for unliquidated damages which he has " against the son in the same way as he could have set off a " debt due from the son if it had been a liquidated amount. " In my opinion the case is covered by the sections of the " Judicature Act and the rule which has been referred to. " I think that it was intended by s. 24, sub-ss. 2 and 3, of the " Judicature Act to give to a defendant the right to set up a " defence, such as is relied on here, in the same way as he " might have raised an equitable defence before the Judicature " Act. If grounds exist which formerly would have entitled

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(1) [1903] 1 K. B. 549.
(2) Ibid. 550.
(3) Ibid. 551.

"a defendant to file a bill in Chancery to restrain the plaintiff "from proceeding with his action, I think a defendant is now "enabled to rely on those grounds as a defence to the action. "If in the present case there had been a claim by the defendant "to set off a liquidated sum of 50*l.* due to him from the son, "the defendant would clearly have been entitled to rely on that "set-off as a defence to the action." Then he goes on to point out that "a plaintiff suing as trustee cannot be in a better "position than an assignee for value suing in his own name, "against whom all equitable defences can be relied on." Channell J. said (1): "I think that this counterclaim ought to "have been allowed as a set-off—that is to say, it is a good "defence to the extent of the plaintiff's claim; it could not, "of course, stand as a counterclaim for the full amount. The "case of *Agra and Masterman's Bank* v. *Leighton* (2) is clear "authority that before the Judicature Act a liquidated amount "owing to the defendant by the plaintiff's son could have been "set off by the defendant against the claim of the plaintiff "suing as trustee for her son. Then the Judicature Act, and "more especially the rules, distinctly put an unliquidated claim "on the same footing as a liquidated claim for the purpose of "set-off; and consequently the defendant's claim against the "plaintiff's son, which, if liquidated, could have been pleaded "before the Judicature Act as a set-off to the plaintiff's claim, "can now, although unliquidated, be relied on as a defence to "the extent of the claim."

I should, perhaps, before quoting from that case, have referred to *Young* v. *Kitchin* (3). That, again, was a case of assignment in which, according to the headnote, "The state-"ment of claim alleged that the plaintiff sued as assignee by "deed of a debt due from the defendant to the assignor on a "building contract. The defendant pleaded, by way of set-off "and counterclaim, that he was entitled to damages for "breaches of contract by the assignor to complete and deliver "the buildings at the specified time whereby the defendant "lost the use of them. On demurrer to so much of the defence "as alleged breaches of contract by the assignor: Held, that "the defendant was not entitled to recover any damages "against the plaintiff, but was entitled by way of set-off or "deduction from the plaintiff's claim to the damages which "he had sustained by the non-performance of the contract by

(1) [1903] 1 K. B. 549, 553.

(2) (1866) L. R. 2 Ex. 56.

(3) (1878) 3 Ex. D. 127.

"the assignor; and that the form of the defence must be "amended accordingly." It is to be observed that in that case not only did the defence allege defects in the work, but it was followed by a claim by way of set-off and counterclaim as follows: The sixth paragraph set out that there had been an agreement whereby the plaintiff had promised to complete and deliver the buildings in August and September, and "that the works were to be paid for by the "defendant on the architect's certificate as they proceeded, "and that defects (if any) were to be remedied or allowed for "by Downs & Co." The seventh paragraph alleged that Downs & Co. (the contractors) did not deliver up the buildings until November, "whereby the defendant was unable to let "the buildings for the reception of hops, for which purpose they "were erected." The eighth paragraph alleged defects in the buildings when delivered up. I have drawn attention to those paragraphs in order to show that part of the set-off and counterclaim related to failure to deliver up buildings completed at the contract date; it was not confined to claims relating to defects in the performance of the work. In those circumstances, Cleasby B., said this in his judgment on that part of the case (1): "There are two objections taken to the defence—one "of substance and the other of form. In substance I think the "defendant is entitled to the benefit of this defence in reduction "of the plaintiff's claim. The Judicature Act, 1873, s. 25, "sub-s. 6, says that the assignment of a debt or other legal "chose in action shall be 'subject to all equities which would "'have been entitled to priority over the right of the assignee "'if this Act had not passed,' that is, subject to all equities "which would be enforced in a court of equity. I think this "is a case where, in equity, the whole matter might be dealt "with and the plaintiff's claim settled, after deducting all "that ought to be deducted in respect of the failure to complete "and deliver the buildings. That is my opinion on the general "merits; but on the question of form I will consider the "pleadings."

It may be helpful also to mention, on this question of equitable set-off, *Rawson* v. *Samuel* (2), and the passage in the judgment of Lord Cottenham L.C. (2), where he refers to some of the previous authorities. He said: "several cases "were cited in support of the injunction; but in every one of "them, except *Williams* v. *Davies* (3), it will be found that the

(1) 3 Ex. D. 127, 130.
(2) (1839) Cr. & Phil. 161, 179.
(3) (1829) 2 Sim. 461.

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"equity of the bill impeached the title to the legal demand. "In *Beasley* v. *Darcy* (1) the tenant was entitled to redeem "his lease upon payment of the rent due; and in ascertaining "the amount of such rent, a sum was deducted which was due "to the tenant from the landlord for damage done in cutting "timber. Both were ascertained sums, and the equity against "the landlord was that he ought not to recover possession of "the farm for non-payment of rent whilst he owed to the tenant "a sum for damage to that same farm. In *O'Connor* v. "*Spaight* (2) the rent paid formed part of a complicated "account; and it was impossible, without taking the account, "to ascertain what sum the tenant was to pay to redeem his "lease. In *Ex parte Stephens* (3) the term equitable set-off is "used; but the note having been given under a misrepresentation, and a concealment of the fact that the party to "whom it was given was at the time largely indebted to the "party who gave it, the note was ordered to be delivered up as "paid. In *Piggott* v. *Williams* (4)"—and this is the case most in point, I think—"the complaint against the solicitor for "negligence went directly to impeach the demand he was "attempting to enforce. In *Lord Cawdor* v. *Lewis* (5) the "proposition is too largely stated in the marginal note; "for, in the case, the action for mesne profits was brought "against the plaintiff, who was held, as against the defendant, "to be, in equity, entitled to the land. None of these cases "furnish any grounds for the injunction in the case before me." Those cases to which the Lord Chancellor referred do, however, indicate the kind of circumstances in which the Court of Chancery gave this equitable relief. As already indicated, the case most in point was *Piggott* v. *Williams* (4), where there was a charge against a solicitor for negligence which went directly to impeach the demand for payment which he was making. In view of those authorities, I think that the present case is one where, on the facts set out in the affidavit, the Court of Chancery would clearly have allowed the defendant's claim as an equitable set-off against the plaintiff's claim. In those circumstances, although I think the point perhaps rather academic, strictly speaking, the proper order in a case of this kind should be that the defendant should have unconditional leave to defend, and not that there should be judgment for the plaintiff with a stay of execution.

(1) (1800) 2 Sch. & Lef. 403*n*.
(2) (1804) 1 Sch. & Lef. 305.
(3) (1805) 11 Ves. Jun. 24.
(4) (1821) 6 Madd. 95.
(5) (1835) 1 Y. & Coll. 427.

I have confined my observations to cases, such as the present, where it is quite clear that the court of equity would have given relief by way of equitable set-off. What the position may be with regard to other kinds of counterclaim it is not necessary to consider. Therefore, although orders of this kind have, in cases very like the present, very often been made, I think Mr. Leon's point a good one and really unanswerable, and that he is entitled to succeed in his appeal.

COHEN L.J. I agree so entirely with what has fallen from my Lord that I wish to add very few words in stating my reasons for considering that the order made below must be varied.

Once Mr. Hale conceded, as, in my view, he was constrained by the authorities to which we were referred, in particular by the decision in *Piggott* v. *Williams* (1), to concede, that the facts alleged in the affidavit sworn for the defendants, if proved at the trial, would establish a good equitable set-off, then it followed that the appeal must succeed. Before the Judicature Act, such claims were very often enforced by injunction, but it is plain from s. 41 that an injunction would not be the appropriate way of giving effect to a set-off now and that effect should be given to it, under s. 38, as an equitable defence if so pleaded. That being so, it seems to me to follow that the matter must be treated as Cleasby B. indicated in *Young* v. *Kitchin* (2) that equity would treat it, namely, by deducting from the claim of the plaintiff all that ought to be deducted in respect of the failure, if failure be proved, to deliver the lorry that the plaintiff received from the defendant.

I add that Mr. Leon was tempted in the course of the argument to suggest that such a set-off would arise if, for instance, in an action for failure to deliver goods, there were a counterclaim for libel. It is unnecessary for us to decide it, but I think that argument inconsistent with the observations of the Lord Chancellor in *Rawson* v. *Samuel* (3), to which my Lord referred. I agree with the order which my Lord has proposed.

Appeal allowed.

Solicitors for the defendants: *Buckeridge & Braune.*
Solicitors for the plaintiffs: *Braby & Waller.*

(1) 6 Madd. 95.
(2) 3 Ex. D. 127
(3) Cr. & Phil. 161.

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Followed. LEDERER *v.* PARKER
[1950] 1 K. B. 90

ROPPEL *v.* BENNETT.
SAME *v.* DAVIES.

C. A.

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July 22, 23.

Tucker,
Bucknill and
Somervell L.JJ.

Landlord and tenant—Rent restriction—Furnished letting—"Substantial "portion of whole rent"—Percentage of capital value of furniture. Application for repayment of past excess rent—Rent at date of application fixed by rent tribunal—Effect on application—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 9, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*b*) —*Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 7.

By s. 9, sub-s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as modified by the Rent and Mortgage Interest Restrictions Act, 1939, "Where any person lets . . . . "any dwelling-house to which this Act applies . . . . at a rent "which includes payment in respect of the use of furniture, and it is "proved to the . . . . county court on the application of the "lessee that the rent charged is yielding or will yield to the lessor "a profit in excess of the normal profit as hereinafter defined, "the court may order that" the excess rent shall be irrecoverable, and that any such excess paid in respect of any period after the beginning of the Act of 1939 "shall be repaid to the tenant." By s. 7 of the Furnished Houses (Rent Control) Act, 1946, ss. 9 and 10 of the Act of 1920 ". . . . shall not apply as regards the rent "charged for any house . . . . entered in the register under . . . . this "Act in respect of any period subsequent to such registration . . . ."

Neither s. 9, sub-s. 1 of the Act of 1920 nor s. 7 of the Act of 1946 defeats a tenant's application for repayment of past excess rent under s. 9, sub-s. 1 by reason that, at the time of his application, the rent which he is actually paying is not alleged by him to be excessive since it has been fixed by a rent tribunal under the Act of 1946.

A tenant had been paying 23*s*. a week rent until a rent tribunal ordered the rent to be reduced to 14*s*. He was paying that sum when he applied for repayment of past rent in excess of 14*s*., contending that 14*s*. a week was a reasonable rent,

Held, that, on the true construction of s. 9, sub-s. 1 of the Act of 1920 and s. 7 of the Act of 1946, the claim was maintainable.

Semble, the words "rent charged" in s. 7 of the Act of 1946 mean the rent which the tenant has to pay by the order of a rent tribunal.

By s. 10, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act, 1923 ". . . . a dwelling-house shall not be deemed to be bona-fide "let at a rent which includes payments" for "the use of furniture "unless the amount of the rent . . . . fairly attributable to the . . . . "furniture, regard being had to the value of the same to the tenant, "forms a substantial portion of the whole rent."

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The weekly amount arrived at by ascertaining the total value of furniture included in a letting and reducing an annual percentage of that value to a weekly figure forming part of the weekly rent is not necessarily, or even normally, the final figure to be attributed to the use of furniture. It is merely a factor to be ascertained among others in determining the figure so attributable.

In deciding whether the sum attributable to the use of furniture is a substantial part of the whole rent, a county court judge is not obliged actually to quantify the sum so atrributable where, after considering all the relevant matters, he is satisfied that, on any view, the sum attributable is or is not a substantial portion of the whole rent. The judgment of Morton L.J. in *Palser* v. *Grinling* [1946] K. B. 631 placed no such obligation on county court judges.

In determining whether the sum attributable to the use of furniture formed a substantial portion of the whole rent, a county court judge took 20 per cent. of the value of 30*l*. placed on the furniture by the registrar, representing 2*s*. 4*d*. a week, as a fair sum for its use as between a willing lender and a willing borrower. That sum was 10·3 per cent. of the whole rent of 23*s*. a week. Taking into consideration the value of the furniture to the tenant having regard to the cost and difficulty of buying similar furniture, the judge found that that value to the tenant was a substantial portion of the whole rent, and held that the room was let furnished within the meaning of the Rent Restriction Acts and so outside their operation. On appeal by the tenant,

Held, that the 2*s*. 4*d*. a week based on 20 per cent. of the value of the furniture was properly regarded as merely one relevant factor, among others, in the calculation; that, on a proper application of the principles laid down by Lord Simon in *Palser* v. *Grinling* [1948] A. C. 291, some addition in respect of other relevant considerations was properly made to the 10·3 per cent. represented by 2*s*. 4*d*. a week, and that the county court judge was consequently justified in finding that the sum attributable to the use of the furniture formed a substantial portion of the whole rent.

Per TUCKER L.J. It is desirable for a county court judge to indicate the final figure on which he bases his decision as to the substantial portion of the whole rent. The figure arrived at in the first place by taking a percentage of the capital value of the furniture is prima facie the percentage which should prevail unless the tenant can show reason why it should be reduced. On the other hand there are other considerations, applicable in the landlord's favour, which may tend to increase it.

Judgment of Morton L.J. and speech of Lord Simon in *Palser* v. *Grinling* [1946] K. B. 631, [1948] A. C. 291, discussed and explained.

APPEALS from Clerkenwell county court.

The facts in the two appeals were indistinguishable in principle. Those in *Roppel* v. *Bennett* were as follows:

On August 19, 1946, the plaintiff landlord let to the defendant tenant a furnished room at 25*s.*, in November, 1946, reduced to 23*s.*, a week. The furniture consisted of a bed, chest of drawers, cupboard, curtains, two chairs and an easy chair, table, gas-fire and gas-stove. The landlord claimed possession of the premises contending that they were furnished and therefore outside the Rent Restriction Acts by virtue of s. 3, sub-s. 2 (*b*) of the Rent and Mortgage Interest Restrictions Act, 1939. The tenant contended that the premises were excluded from that provision by the operation of s. 10 of the Rent and Mortgage Interest Restrictions Act, 1923, because, she said, the amount of the rent fairly attributable to the use of the furniture was not a substantial portion of the whole rent. The registrar, on a reference of the matter to him, reported that the value of the furniture was 30*l.* The county court judge accepted that report, and the parties were agreed that 20 per cent. of the value, that was, 6*l.*, was a fair annual figure representing what a willing borrower would pay a willing lender for the use of the furniture.

On April 17, 1947, Hackney, Islington and Stoke Newington Rent Tribunal, on a reference to it of the tenancy by the tenant under the Furnished Houses (Rent Control) Act, 1946, reduced the rent of 23*s.* a week to 14*s.* a week from that date. By her counterclaim the tenant alleged that the rents of 25*s.* and 23*s.* a week were excessive and that the proper rent would have been 14*s.* a week, and she claimed on that basis repayment of the excess rent paid by her down to April 17, 1947.

The county court judge found that the 6*l.* a year, or 2*s.* 4*d.* a week, attributable to use of the furniture was a substantial portion of the whole rent and that the premises were accordingly not within the Rent Restriction Acts, and he made an order for possession. He made an order for repayment of rent on the tenant's counterclaim. The tenant appealed against the order for possession and the landlord cross-appealed on the question of repayment of excess rent.

Magnus for the tenants.
H. B. Grant for the landlord.

Grant (on the cross-appeal). This point turns on the proper construction of s. 9, sub-s. 1 of the Rent Restriction Act of 1920 as modified by sch. I. to the Act of 1939. It is a condition precedent to the jurisdiction of the county court under s. 9, sub-s. 1 of the Act of 1920 that, at the time of the tenant's application, the rent charged is yielding or will yield to the landlord a profit in excess of the normal profit. "Rent charged" in s. 9, sub-s. 1, means rent actually charged at the time of the application of the tenant, that is, the date of the defence and counterclaim in this case. If "rent charged" in s. 9, sub-s. 1, means "rent contractually charged," it is conceded that the cross-appeal must fail; but, it is submitted, the plain meaning of "rent charged" in that sub-section is "rent "actually charged." The same words are also used in the sense contended for in s. 7 of the Furnished Houses (Rent Control) Act, 1946—"Rent payable" in s. 12, sub-s. 7 of the Act of 1920 means rent actually payable: *J. & F. Stone Lighting and Radio Ld.* v. *Levitt* (1). It would work great injustice on landlords if the construction of those words for which the tenants contend here were adopted.

Magnus (for the tenants). The words "rent charged" in s. 7 of the Act of 1946, are there used because the section brings in s. 9 of the Rent Restriction Act of 1920 in order to exclude its provisions as from the date of registration of a rent as fixed by a rent tribunal. The precise meaning of those two words is irrelevant, since s. 7 expressly provides that "save as aforesaid nothing in this Act shall affect the provisions "of the Rent and Mortgage Interest Restrictions Acts, 1920 "to 1939." Section 9, sub-s. 1 of the Act of 1920 provides that "where any person lets, or has . . . . let . . . . at a rent . . . . "which is . . . . yielding or will yield . . . . a profit . . . . in "excess," etc., the excess is recoverable, that is, an excess existing now or in the past. The words "is yielding or will "yield" do not apply to the time of the application under s. 9, sub-s. 1, only. The words "on the application" in the subsection mean "on application made by the tenant," that is, whenever the tenant makes application. Section 9, sub-s. 1 of the Act of 1920 confers a right of action on the tenant as soon as an overcharge is made, and that right of action remains vested in him for the full period of limitation under the Limitation Act, 1939. He may therefore sue for an overcharge even after he has ceased to be a tenant, a fortiori, while he is still tenant, even though the rent charged at the date of the application is not excessive. The concluding part of s. 9, sub-s. 1 "the amount of any payment of rent in excess of such "sum which may have been made *in respect of any period after "the passing of this Act*, shall be repaid to the tenant" would seem to be conclusive.

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(1) [1947] A. C. 209.

SOMERVELL L.J. The appeals turn on the sections of the Rent Restriction Acts concerning furnished lettings. By s. 12, sub-s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as originally enacted: ". . . . (i.) this Act "shall not, save as otherwise expressly provided, apply to a "dwelling-house bona fide let at a rent which includes pay-"ments in respect of board, attendance, or use of furniture." As a result of certain judicial decisions that part of the Rent Restriction code was amended by s. 10, sub-s 1, of the Rent and Mortgage Interest Restrictions Act, 1923, whereby: "For the "purposes of proviso (i.) to sub-s. 2 of s. 12 of the principal "Act (which relates to the exclusion of dwelling-houses from "the principal Act in certain circumstances), a dwelling-house "shall not be deemed to be bona fide let at a rent which includes "payments in respect of attendance or the use of furniture "unless the amount of rent which is fairly attributable to the "attendance or the use of the furniture, regard being had to the "value of the same to the tenant, forms a substantial portion "of the whole rent." That sub-section applies to the houses in question here, to which, however, as they are houses to which the Rent and Mortgage Interest Restrictions Act, 1939, applies, s. 3 of that Act, replacing s. 12, sub-s 2, of the Act of 1920, is also applicable.

In *Roppel* v. *Bennett* the particulars of claim contained a claim for possession on the ground that the tenancy was not protected by the Rent Restriction Acts. In her defence the tenant denied that the premises constituted a furnished letting within the meaning of the Rent Restriction Acts, and claimed the protection of those Acts. There was plenty of furniture in the premises: they were furnished in the ordinary sense; but that does not conclude the matter. [His Lordship referred to the facts, and continued:] It is plain from the county court judge's judgment that he did not find 2*s*. 4*d*. a week as the figure which represented the value of the furniture to the tenant within the meaning of s. 10, sub-s. 1, but merely that that figure was agreed to represent what would be paid for this furniture as between two ordinary parties on the basis of the value of 30*l*. The judge found that the 2*s*. 4*d*. a week paid in respect of the furniture was a substantial portion of the rent of 23*s*. a week.

The construction and application of s. 10, sub-s. 1 of the Act of 1923 came before this court in *Palser* v. *Grinling* (1), and *Property Holding Company, Ld*. v. *Mischeff* (2), and then

(1) [1946] K. B. 631. (2) [1946] K. B. 645.

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before the House of Lords (1). The former was concerned not with furniture but with attendance. Morton L.J., in a judgment with which the other two members of the court, of whom I was one, agreed, discussed the question what constitutes "a substantial portion of the whole rent." Morton L.J., in that part of his judgment proceeded, as is quite clear from what he says, on the view that it was right and proper for this court to lay down guidance in the form of limits—a percentage—below which an amount would not in ordinary circumstances be treated as a substantial portion, and a percentage above which it should be treated as a substantial portion. He said (2): "The legislature has not seen fit to lay down any particular "percentage as being a substantial portion, and I have carefully "considered whether it would or would not be of assistance to "judges who have to determine this difficult question if I gave "some indication of my own view as to what proportion of the "rent forms a substantial portion of the 'whole rent' within "the meaning of s. 10. We were invited by Mr. Cartwright "Sharp to give some indication of this kind, and, on the whole, "I think it is right to do so now, but I do not think it would "be right to fasten upon a particular percentage and say "'This is a substantial portion and any percentage below this "'is not a substantial portion.' I am, however, prepared to "say that, in my view, in the absence of special circumstances, "20 per cent. of the whole rent would be a substantial portion, "any portion under 15 per cent. would not be a substantial "portion, and any portion from 15 per cent. up to 20 per cent. "would be a 'border-line' case." The view which I take on this matter is not really material, perhaps, to my final conclusion on this case, but I will refer to what Lord Simon said in his speech in the House of Lords about that passage in Morton L.J.'s judgment. Lord Simon said (3): "'Sub-"'stantial' in this connexion is not the same as 'not unsub-"'stantial,' that is, just enough to avoid the 'de minimis' "principle. One of the primary meanings of the word is "equivalent to considerable, solid or big. It is in this sense "that we speak of a substantial fortune, a substantial meal, "a substantial man, a substantial argument or ground of "defence. Applying the word in this sense, it must be left to "the discretion of the judge of fact to decide as best he can "according to the circumstances in each case, the onus being

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(1) [1948] A. C. 291.

(2) [1946] K. B. 631, 640.

(3) [1948] A. C. 315, 317.

"on the landlord. If the judgment of the Court of Appeal in "*Palser* v. *Grinling* (1) were to be understood as fixing "percentages as a legal measure, that would be going beyond "the powers of the judiciary. To say that everything over "20 per cent. of the whole rent should be regarded as a "substantial portion of that rent would be to play the part "of a legislator: if Parliament thinks fit to amend the statement by fixing percentages, Parliament will do so. Aristotle "long ago pointed out that the degree of precision that is "attainable depends on the subject matter." I construe that as meaning that Morton L.J.'s suggestion, agreed to by the other two members of the court, which was, of course, applicable in ordinary circumstances and subject to special conditions, really passes out of the picture as laying down limits on which a party can rely as a matter of law. The question is, therefore, left to the county court judge to decide as one of fact, and either side may seek to establish that there was no evidence on which the court could make its finding, having regard to what Lord Simon said about the meaning of the word "substantial."

In the present case, 2*s*. 4*d*. looked at by itself is between 10 and 11 per cent. of the contractual rent. It is unnecessary, in my view, to decide whether, if the matter had rested there, the tenant could have succeeded in persuading this court to reverse the decision of the county court judge, for it is clear from his judgment that he did not take the 2*s*. 4*d*. as the figure which he had to consider. His attention was drawn to the decisions of the House of Lords referred to, and it is plain from his note that he studied and considered carefully what had been said by Lord Simon. In particular, it is plain that he relied on and applied this passage from Lord Simon's speech (2): "A number of factors may be relevant in arriving at the proper "figure. The governing consideration is the word 'fairly.' "The questions involved are to be answered by common-"sense considerations rather than by any formula which can be "laid down by this House. In assessing 'the amount of rent "'which is fairly attributable' to the use of furniture, a chief "consideration is that if and so far as the landlord does not "provide furniture which the tenant would normally require "to use, the tenant would have to provide it himself. It is the "value to the tenant of the landlord's covenant to provide "furniture which mainly controls the figure to be arrived at, "and not the cost of such furniture to the landlord, though the

(1) [1946] K. B. 631.

(2) [1948] A. C. 315.

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"latter in many cases may also be a relevant factor." That passage, I think, does modify the approach which Morton L.J. laid down in this court in those cases. I do not think it necessary to compare in detail what was said in this court with what was said in the House of Lords, for the decision of the House is the law on the matter. The 2*s*. 4*d*., therefore, as it seems to me, instead of becoming necessarily or normally the final figure, is the figure to which Lord Simon refers as the one which in many cases may also be a relevant factor. The judge on this part of the case said: "As to the argument of counsel "that 6*l*. a year represents the value to the tenant of the "use of the furniture, I understand that this was possibly "based on the percentages suggested by Morton L.J. But "that test did not meet with approval in the House of Lords. "What I have to consider is the value to the tenant of the "landlord's obligations based on the wider consideration "referred to in the speech of Lord Simon, and then to compare "it with the contractual rent . . . . I proceed to point out "the wider consideration mentioned by Lord Simon. Inter "alia, it is necessary here to bear in mind that the room was "let fully furnished in the ordinary meaning of that phrase. "Practically everything was provided which the tenant would "require; also I must consider the probable cost to the tenant "of the purchase or hire of similar furniture, if such was readily, "or at all, available, the high rates prevailing in 1946 for such "articles, and the greatly increased cost of maintenance and "possible removals. I find that the value to the tenant in "respect of the use of the furniture is a substantial portion of "the contractual rent, and that the room was let furnished "within the meaning of the Rent Acts."

It seems to me plain from that passage that the county court judge was applying to the facts of this case the principle which Lord Simon's speech showed that he had to apply, and that, having regard to that principle, he was finding that what was to be added to the 2*s*. 4*d*. made the portion of the rent attributable to the furniture a substantial portion of the whole rent within the meaning of s. 10, sub-s. 1, properly construed. Prima facie that finding cannot be disturbed in this court; but counsel for the tenant took the point that the judge has misdirected himself in that he has not quantified what I may call his final figure in pounds, shillings and pence. Counsel refers to the following passage in Morton L.J.'s judgment in *Palser* v. *Grinling* (1) which, he says, is not adversely commented on or impliedly modified by anything said in the House of Lords: "Whatever method the judge employs, it seems to me that, "having fully considered all the relevant circumstances, he "must arrive at an actual figure in pounds, shillings and pence "as being 'the amount of rent fairly attributable to the "'attendance, regard being had to the value of the same to the "'tenant'." I think it fair to point out that Morton L.J.'s general approach was one which more readily led to a precise quantification than do some of the considerations which Lord Simon said that the tribunal of fact ought to take into account. No doubt the county court judge must have his mind directed to a figure, which obviously is one of pounds, shillings and pence, when about to decide what is not substantial, but I cannot think that Morton L.J. intended to place on the county court judge the burden of arriving at an actual figure in a case where, having considered all the proper matters, including such figures as there are before him, he is satisfied that on any view the case falls clearly on one side of the line or on the other. In a case where, assuming the maximum value for all the considerations which had to be taken into account, he was of opinion that the portion was not substantial, it might be intolerable if he had to quantify a lot of items and reduce them to pounds, shillings and pence. Equally in another case, as here, having before him the figure of 2*s*. 4*d*. which enters into the calculation, he might, and I think in this case did, come to the conclusion that, having regard to the other factors which he had to take into account, the portion of the rent attributable to furniture came well over what he was regarding, and entitled to regard, as a substantial portion of the whole rent. There again, I think, it would be putting an undue burden upon him to say that he must, as a matter of law in his notes of judgment, quantify and express in pounds, shillings and pence the final figure at which he has arrived. As a matter of law, that point fails.

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(1) [1946] K. B. 631, 640.

For those reasons, I do not think that the tenant can succeed in displacing the county court judge's finding that the amount paid by the tenant in respect of the furniture was a substantial portion of the contractual rent within the meaning of s. 10, sub-s. 1. The landlord is therefore entitled to the order for possession which the county court judge made in her favour. [His Lordship referred to the facts in the other case, and continued:] Therefore, the tenant fails in her attempt to establish that the sums paid in respect of the furniture did not constitute a substantial portion of the whole rent.

The counterclaim depends on s. 9, sub-s. 1 of the Act of 1920, as modified by sch. I. to the Act of 1939 in its application to houses which were brought under control for the first time by the Act of 1939. [His Lordship read the sub-section.] By sub-s. 2, as modified, " For the purpose of this section ' nor-" ' mal profit ' means the profit which might reasonably have " been expected from a similar rent in the year ending on " September 1, 1939." That section introduced a code by which tenants of furnished lettings might seek to have their rents reduced.

In 1946 a different procedure was set up by the Furnished Houses (Rent Control) Act, 1946, for enabling tenants of furnished lettings to have their rents reduced. That Act set up special tribunals, which have power to reduce the sum paid by the tenant, and a register in which the reduced sum is entered. Section 7, with which this case is concerned in particular, provides: " Sections 9 and 10 of the Increase of " Rent and Mortgage Interest (Restrictions) Act, 1920 (which " relate respectively to limitation on rent of houses let furnished " and to penalty for excessive charges for furnished lettings), " shall not apply as regards the rent charged for any house or " part of a house entered in the register under the provisions " of this Act in respect of any period subsequent to such " registration, but save as aforesaid nothing in this Act shall " affect any provisions of the Rent and Mortgage Interest " Restrictions Acts, 1920 to 1939." [His Lordship further referred to the facts and continued:]

The counterclaim, having set out those facts, continues: " The said charges "—that means, the 25*s.* and the 23*s.*— " were, by s. 9, sub-s. 1 of the Increase of Rent and Mortgage " Interest (Restrictions) Act, 1920, as amended by sch. I. to " the Rent and Mortgage Interest Restrictions Act, 1939, " excessive in that they yielded to the [landlord] a profit in " excess of the normal profit thereunder. The [tenant] says " that a proper charge would have been 14*s.* a week." A similar counterclaim was made, with respective differences in figures, in the other case. That counterclaim was delivered on September 5, 1947, when the rent which the tenant was having to pay was 14*s.* a week, a sum not suggested in the counterclaim to be excessive. The question really, as it seems to me, is whether, having regard to s. 9, sub-s. 1 of the Act of 1920 and s. 7 of the Act of 1936, a tenant can make an application under s. 9, sub-s. 1 in respect of a period anterior to the date of the application where at the date of the application it is impossible to say, and it is not sought to say, that the rent is excessive within the meaning of that sub-section. That is the short point.

Section 7 of the Act of 1946 clearly does not, at least by any express words, prevent an application in respect of a period before the premises were entered in the register. What it says expressly is that s. 9 of the Act of 1920 " shall not apply as " regards the rent charged for any house or part of a house " entered in the register under the provisions of this Act in " respect of any period subsequent to such registration." The tenant is not seeking to do that, and the reason for such a provision is plain. I agree with the submission for the landlord, though it may not be necessary to decide it, that the natural meaning of the expression " rent charged " in s. 7 of the Act of 1946 is the amount which the tenant actually has to pay after the rent tribunal have come to their finding and the matter has been entered in the register. It would obviously be oppressive if the tenant, having applied to one tribunal, summoned the landlord and witnesses before it, and had his rent reduced by that procedure, could then apply to the county court to have the reduced figure further reduced under s. 9. As it seems to me, s. 7 is silent as to the point which we have to decide. Counsel based his argument for the landlord on the actual wording in s. 9 of the Act of 1920 as amended. He is seeking, in my view, to read the words " on the application " in s. 9, sub-s. 1 of the Act of 1920 as if they were " at the time of the application." If it were necessary for a tenant to show that at the time of his application the rent charged was in excess of the normal profit, and if the words " the " rent charged " there mean the sum which he is actually paying on that day, then, of course, the tenant would fail here because the sum which she was paying at the time of filing her counterclaim was 14*s*., the sum put forward in the counterclaim as a fair sum to pay for the premises over the period. I cannot myself construe the words " on the application " as meaning " at the time of the application."

Section 9, sub-s. 1, confers a right to relief in two different forms: the applicant tenant can have his rent reduced and he can also obtain repayment of sums in respect of the unreduced rent which he has previously paid to his landlord. Unless there are express words which negative it, a person entitled to relief under s. 9, sub-s. 1, can do as the tenant has done here and claim in respect of a period anterior to the date when the application is filed. The court will look at what was happening in that earlier period, and if it finds that a sum yielding a profit in excess of the normal profit was then being paid, the sub-section will apply. The tenant will have the remedy which the sub-section confers upon him, and he will have repaid to him the amount of rent paid over the period in question in excess of the reduced sum. That is the view which the county court judge took. He said: "As to the point raised as to the effect "of s. 9, sub-s. 1 of the Act of 1920, I hold that the sub-"section applies to past and future lettings, and the counter-"claim is maintainable."

Counsel for the landlord based an argument on the words "is yielding or will yield." It is true that the words "has "yielded" are absent. I could not follow his submission that "is yielding" has a different meaning from "yields"; but he was quite right in drawing our attention to the fact that words are not used referring to the past and that there are words referring to the future. I think that the explanation is simple: it is normally the case that people can by legal proceedings initiated on a certain date claim in respect of any relief to which they may be entitled over a past period, whereas it is less usual, or unusual, that a person can resort to a court before the injury complained of has actually descended upon him. It may therefore well have been thought necessary to provide expressly for the future. If the lease provided for a progressive rent and the tenant wished to complain that a rise two or three months later would bring him within the sub-section, he could under s. 9, sub-s. 1, as worded, apply on the ground that the rent to be charged in the future would yield an excessive profit to the landlord. Anyhow, the draftsman intended that the sub-section should be applicable, in certain circumstances, to future events, and one would expect to find express words conferring that right.

The same principle applies and the same questions are raised in the other two cases, and it is not necessary to refer to the facts and figures in them. I think that these appeals and cross-appeals fail, and that the judge's orders should stand.

TUCKER L.J. I am so completely in agreement with the result of these appeals and cross-appeals as stated by SOMERVELL L.J. and with his reasons for arriving at that result, that I desire to add a few observations only in the case of the tenant Mrs. Bennett. The 2*s.* 4*d.* represents a percentage of between 10 and 11 per cent.; but, as stated by my brother, it is clear that the 2*s.* 4*d.* only represents the first stage of the calculation described in Morton L.J.'s judgment in *Property Holding Co., Ld.* v. *Mischeff* where he said (1): "He should "first consider what, upon the evidence, was the capital value, "at the date when the lease was executed, of the furniture "included in the demise . . . . He should then consider what "percentage of that capital value should be regarded as the "amount of rent fairly attributable to the furniture, taking "into account such matters as the loss of interest by the "landlord on his capital expenditure and the probability of "depreciation and any other matters which he thinks it proper "to take into account." I think it clear that it is there that the figure of 2*s.* 4*d.* is arrived at. Morton L.J. went on: "Next, the judge must have regard to 'the value of the same "'to the tenant.' These words raise difficult questions in "some cases. In my view, if a dwelling-house is bona fide "let to any tenant at a rent which includes payments in respect "of certain articles of furniture, then prima facie those articles "are of the same value to that tenant as they would be to any "other tenant, and the burden lies on the tenant to show that "by reason of some special circumstances those articles should "be treated as being worth less to him than they would be to "any other tenant . . . . No such circumstances were proved "in the present case." I think that Morton L.J.'s judgment tends to indicate, at any rate, that, unless the tenant here can show some reason for reducing the figure of 2*s.* 4*d.* a week, prima facie that figure would be the percentage which would prevail. Lord Simon's speech on the appeal to the House of Lords shows that there are other counterbalancing considerations to be taken into account from the landlord's point of view. Lord Simon said (2): "It is the value to the tenant "of the landlord's covenant to provide furniture which mainly "controls the figure to be arrived at, and not the cost of such "furniture to the landlord, though the latter in many cases "may also be a relevant factor. If the tenant provided the "furniture himself, he would have to suffer the loss due to "wear and tear, whereas if the landlord provides the furniture, "the burden of wear and tear (in the absence of an express "covenant) falls on him. On the other hand, it must not be "overlooked that when the landlord lets the use of furniture

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(1) [1946] K. B. 650, 651.

(2) [1948] A. C. 316.

"he does not, apart from special agreement, undertake to repair "it, or to renew it from time to time when it becomes worn out." Then he refers to other matters which have to be taken into consideration, such as the age of the furniture, and says: "What the judge of fact has to do is to take the furniture as it "is and to fix a fair rental for it, having regard to its value to the "tenant, remembering that old furniture wears out sooner than "new and that the landlord (apart from special covenant) "does not undertake to repair or renew it. These balancing "considerations are not capable of being precisely quantified "and the judge of fact has in the end to arrive at a figure which "he considers in the result fairly allows for the relevant "matters to be taken into account." I think that the county court judge has obviously very carefully studied Lord Simon's speech, has applied it, and applied it properly, with the result that he added something, and something valuable, to the 10 per cent., or 10·3 per cent., which would be represented by the 2*s.* 4*d.* I think that there was ample material in this case to justify him in arriving at that figure.

Morton L.J. indicated the necessity of the judge's stating his finding with regard to the portion of the rent in the form of pounds, shillings and pence, and Lord Simon said (1): "the judge "of fact has in the end to arrive at a figure which he considers "in the result fairly allows for the relevant matters to be taken "into account." Bearing those statements in mind, I think that, generally speaking, it would be desirable for county court judges to indicate their final conclusion with regard to the portion of the rent. I think that that can generally be done by taking a broad view of the matter. I do not think that the mere fact that in the present case the county court judge has not stated in black and white the precise arithmetical result at which he has arrived after making some additions to the 10·3 per cent. invalidates his judgment, or would justify us, in view of the very careful consideration which he obviously gave to the evidence, in sending the case back to him to state the precise proportion at which he had arrived.

I agree that the appeals and cross-appeals fail.

BUCKNILL L.J. I agree. In the case of the tenant Bennett, the room was completely furnished, including such things as a bed, chest of drawers, cupboard, curtains, two chairs and an easy-chair, a table, gas-fire and gas-stove. Taking into consideration what it would cost to buy those things, even

(1) [1948] A. C. 316.

secondhand, or to hire them, I do not think that 2*s*. 4*d*. is by itself a sound basis on which to work.

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Appeals and cross-appeals dismissed.

Solicitors for the tenants : *S. Rabin & Co.*
Solicitors for the landlord : *H. B. Wedlake, Saint & Co.*

R. C. C.

LAWSON AND HARRISON *v.* ODHAMS PRESS LD.

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Oct. 7.
Lord Greene M.R. and Tucker L.J.

Defamation — Libel — Practice — Interrogatory — Action against proprietor of a newspaper and writer of signed article therein, employed by proprietor—Plea of fair comment—Interrogatory to writer of article as to source of information—Discretion of judge—Ground for exercising, when disallowing interrogatory.

The plaintiffs brought an action claiming damages for libel in respect of an article in a Sunday newspaper against (1.) the proprietors, printers and publishers of the newspaper, (2.) the writer of the article, who signed it, and (3.) the managing editor of the newspaper. By their defence all these defendants admitted that they had printed or caused to be printed and published the words complained of. They denied that the words were capable of bearing the meanings alleged or any defamatory meaning and alternatively they pleaded that the words were fair comment on a matter of public interest made in good faith and without malice towards the plaintiffs who, by their reply, alleged that the defendants and each of them were actuated by malice. The following interrogatory was addressed to the writer of the signed article : " From whom " did you obtain the information on which you relied in writing " and/or causing to be printed and published the said expressions " of opinion or any and which of them ? " For the purpose of the interlocutory proceedings the writer of the article had sworn an affidavit in which he said that he had at all material times been and still was in the sole and exclusive employment of the proprietors of the newspaper ; that he was now employed by them as a writer on sports and sporting events ; and that he wrote weekly articles under his own name in this Sunday newspaper on which he was employed. Everything written by him was based on information which he obtained in the course of his employment by that newspaper and under the control and instructions of his editor. He was cross-examined on his affidavit and said that in securing the ininformation on which his articles were based he was not limited in any way as to the source from which he obtained it. With regard to the article of which complaint was made he had had no

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instructions of any kind from his editor. The interrogatory was allowed by the master but disallowed by the judge in chambers, who gave no reasons for his decision.

Held that the court must assume that the judge had dealt with the question as a matter of discretion. It was open to him to take the view that, recognizing that it had become a matter of practice, and possibly a matter of law, that an interrogatory of this kind would not be allowed to be administered to the proprietor or publisher of a newspaper (see *Plymouth Mutual Co-operative and Industrial Society, Ld.* v. *Traders' Publishing Association, Ld.* [1906] 1 K. B. 403), and that this practice had grown up in what was considered to be the public interest, as a matter of discretion, he should not allow the interrogatory to be administered to a person in the position of the writer of the article, which would have the effect to all intents and purposes of nullifying the usefulness of this rule of practice which existed.

The court expressed no opinion as to what would have been their decision had the judge intimated, as a matter of law, that the writer of the article was entitled to the protection accorded to the proprietor and publisher of a newspaper.

Per Lord Greene M.R. In interlocutory proceedings, an order should not be made for the cross-examination of the deponent on his affidavit sworn in those proceedings, in the absence of special circumstances.

Appeal from Jones J. in chambers.

The plaintiffs, Frederick Thomas Lawson and George Francis Harrison, brought an action claiming damages for libel in respect of an article published in *The People* newspaper on August 17, 1946, against the defendants Odhams Press Ld., as the proprietors, printers and publishers of that newspaper, Alan John Fraser Hoby as the writer of the article, who signed it, and Renton Stuart Campbell as the managing editor of that paper. The article referred to the promotion and organization of a boxing contest or exhibition which had then recently taken place at Yeovil, with which the plaintiffs were concerned. By their defence all these defendants admitted that they had printed or caused to be printed and published the words complained of. They denied that the words were capable of bearing the meanings alleged or any defamatory meaning and alternatively, they pleaded that the words were fair comment on a matter of public interest made in good faith and without malice towards the plaintiffs who, by their reply, alleged that the defendants and each of them were actuated by malice.

Amongst other interrogatories the following was addressed to the defendant Hoby: "From whom did you obtain the "information on which you relied in writing and/or causing

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"to be printed and published the said expressions of opinion "or any and which of them?" The defendant Hoby in the course of these interlocutory proceedings before the judge had sworn an affidavit in which he stated that he had been and still was in the sole and exclusive employment of Odhams Press Ld., and that he had been so employed continuously, save for a period of war service, since December 14, 1937. He was now so employed as a writer on sports and sporting events and he wrote weekly articles under his own name in *The People,* the newspaper on which he was now employed. Everything written by him was based on information which he obtained in the course of his employment by that newspaper and under the control and instructions of his editor. Application was made that the defendant Hoby should attend for cross-examination on his affidavit and Hoby being present his cross-examination was consented to by all parties. On this examination he said that in securing the information on which his articles were based, he was not limited in any way as to the source from which he obtained it. With regard to the article of which complaint was made he had had no instructions of any kind from his editor. The interrogatory was allowed by the master but disallowed by Jones J., the judge in chambers who gave no reasons for his decision.

The plaintiffs appealed from the order of Jones J., disallowing the interrogatory.

Neil Lawson (*Gilbert Dare* was with him) for the plaintiffs. The judge was wrong in disallowing this interrogatory which, it is clear, was relevant on the issue of malice: *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (1). In his discretion, the judge should have allowed it to be put to the defendant Hoby. No doubt, there is an exception to the general rule that such an interrogatory is admissible, that in actions against the proprietors or publishers of newspapers there is a rule of practice that interrogatories asking from whom the information was obtained will not be allowed, in the absence of special circumstances, even though privilege or fair comment is pleaded and malice is directly in issue: *Hennessy* v. *Wright* (2); *Hope* v. *Brash* (3) and *Plymouth Mutual Co-operative and Industrial Society, Ld.* v. *Traders' Publishing Association, Ld.* (4).

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(1) [1905] 1 K. B. 653.

(2) (1888) reported in a note to *Parnell* v. *Walter* (1890) 24 Q. B. D. 441.

(3) [1897] 2 Q. B. 188.

(4) [1906] 1 K. B. 403.

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The reason for this immunity of newspaper proprietors and publishers appears to be that it is not desirable on grounds of public interest that the name of a newspaper informant should be disclosed, as appears from the judgment of Buckley L.J. in *Adam* v. *Fisher* (1). But this exception should not be extended, as appears from *South Suburban Co-operative Society* v. *Orum and Others* (2) where it was held that this exceptional protection and immunity does not extend to protect a defendant who is the writer or contributor of a letter published in a newspaper. The decision in *Adam* v. *Fisher* (1) was cited in *South Suburban Co-operative Society* v. *Orum* (2) and the two decisions appear to be inconsistent. *Adam* v. *Fisher* (1) is not mentioned in the judgment in the *South Suburban* case. The defendant Hoby here is a separate defendant and has a separate identity from the proprietors of the newspaper who employ him: if the plaintiffs had merely sued Hoby he could not contend that he was entitled to this immunity. By his evidence, Hoby showed that, though he was the employee of Odhams Press Ld., he was not limited in any way as to the sources from which he got his information and that with regard to the article of which complaint was made he had no instructions of any kind from his editor. It is admitted on the pleadings that Hoby had printed or caused to be printed and published the words of which complaint was made. His position in law is the same as that of the defendant Orum in *South Suburban Co-operative Society* v. *Orum* (2), who wrote a letter to a newspaper and who was directed to answer a similar interrogatory. In *Lyle-Samuel* v. *Odhams, Ld.* (3) which was an action against the proprietors, printers and publishers of a newspaper, the Court of Appeal followed *Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Association* (4), but Scrutton L.J. said (5): "Whatever I may personally think of the desirability or "undesirability of such a rule, I do not think I am at liberty "to depart from a rule of practice which has been acted "upon for over thirty years and recognized in three judgments "of the court . . . ." and again, "feeling myself bound "by the previous decisions of this court, whatever my view "might have been had I approached the question unfettered "by authority . . . . I agree that the appeal must be "dismissed."

(1) (1914) 110 L. T. 537, 540.
(2) [1937] 2 K. B. 690.
(3) [1920] 1 K. B. 135.
(4) [1906] 1 K. B. 403.
(5) [1920] 1 K. B. 135, 146.

[TUCKER L.J. If a plaintiff can ascertain the name of the writer of the article complained of and sues him with the proprietors of the newspaper, if your contention is right, the protection and immunity so far enjoyed by the proprietors would be destroyed. Is that not rather a narrow view?]

It is submitted that the exception to the general rule by which such an interrogatory is admissible in an action of this kind, where malice is material, has not found favour in the courts recently and that it should not be extended.

[TUCKER L.J. In what way do you say the learned judge wrongly exercised his discretion?]

He gave no reasons for his decision and it must be taken that he felt himself bound in law to include this case under the rule of practice, which gives this protection to newspaper proprietors.

[*Korda and Others* v. *Odhams Press Ld. and Another* (1) and R. S. C. Ord. 31, r. 1, were referred to.]

Sir Valentine Holmes K.C. and *John Davidson* for the defendants were not called on.

TUCKER L.J. The interrogatory addressed to the defendant Hoby was in these terms: "From whom did you the second "defendant obtain the information on which you relied in "writing and/or causing to be printed and published the said "expressions of opinion or any, and which of them?" That interrogatory was allowed by the master and disallowed by Jones J. Mr. Hoby had sworn an affidavit in which he stated that he had at all material times been and still was in the sole and exclusive employment of the defendant company, that he had been so employed continuously, save for war service, since December 14, 1937, and he said: "I am now "employed by the defendant company as a writer on sports "and sporting events and I write weekly articles under my "own name in *The People* the newspaper on which I am "employed. Everything written by me is based upon "information which I obtain in the course of my employment "by the said newspaper and under the control and instructions "of my editor." The somewhat unusual course in cases of this nature was taken of requiring that the defendant should attend for cross-examination on that affidavit. It is not necessary for the purpose of this appeal to refer to that cross-examination, which I do not think in substance produced any

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(1) [1948] W. N. 376.

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evidence substantially differing from that to which Mr. Hoby had sworn in his affidavit.

It is said by Mr. Neil Lawson for the plaintiffs that the learned judge was wrong, as a matter of law, in disallowing this interrogatory. He puts his case in this way. He says we ought to infer from all the circumstances of the case that the judge disallowed this interrogatory because he considered that as a matter of law he was precluded from allowing such an interrogatory, the matter of law being that such an interrogatory cannot be directed in an action of this kind to a newspaper or to the proprietor and publisher of a newspaper, and that, as a matter of law, that protection also applied where such an interrogatory was directed to a servant of the company who had contributed an article to the newspaper, the proprietors and publishers of which were also defendants in the proceedings. I think it is conceded that the fact that the article was signed by Mr. Hoby adds nothing in support of the plaintiffs' appeal. Mr. Neil Lawson said that once a plaintiff finds out who is in fact the author of a particular article and makes him a defendant, such defendant as a matter of law—I think he must put it as high as that—can be always required to answer an interrogatory as to the source of his information and the name of his informant upon which the article is based. Mr. Lawson has taken us through the authorities on this point to which it is not necessary, I think, to refer in detail. It is a fact that it has now become a matter of practice, and possibly a matter of law, that an interrogatory of this kind will not be allowed to be administered to the proprietor or publisher of a newspaper. I do not think it is necessary to go back further beyond the case of *Plymouth Mutual Co-operative and Industrial Society, Ld.* v. *Traders' Publishing Association, Ld.* (1). In that case Vaughan Williams L.J., after referring to the earlier cases of *Hennessy* v. *Wright* (2) and *Hope* v. *Brash* (3), and quoting from their judgments said (4): "It seems to me that "under these circumstances the question which we have to ask "ourselves is whether there are any special circumstances in "this case which would justify a departure from the general "rule of practice as to not compelling the disclosure of the "names of the persons who supplied the information on which "the alleged libel was based in cases of this kind, where the "proprietors of a newspaper or other periodical publication set

(1) [1906] 1 K. B. 403.

(2) 24 Q. B. D. 441.

(3) [1897] 2 Q. B. 188.

(4) [1906] 1 K. B. 415.

" up a defence such as is here pleaded. I do not find any " such special circumstances in this case." That is, as the Lord Justice said, the general rule of practice which had sprung up by 1906, and which has prevailed ever since.

At the other end of the line of cases on this subject comes *South Suburban Co-operative Society, Ld.* v. *Orum and Others* (1), where this court had to consider whether that rule of practice extended to the case of a letter appearing in a newspaper from an ordinary outside correspondent. It was held that the learned judge in chambers had rightly allowed, in his discretion, the administration of an interrogatory in such a case. The headnote in that case is as follows: " Where, " to an action for libel in respect of a letter published in a " newspaper there are pleas that the letter is fair comment made " in good faith and without malice on a matter of public interest, " an issue being thus raised as to the attitude of mind of the " defendant at the time when the letter was published, the " special rule of practice which in such a case exempts a " defendant who is the proprietor or the publisher of the " newspaper from disclosing the name of a person who " supplied information contained in the letter notwithstanding " that such information is otherwise relevant to that issue, " does not extend to protect a defendant who is the writer or " contributor of the letter from disclosing the names of his " informants." Scott L.J., in delivering the judgment of the court referred to the line of authorities with regard to the newspaper cases and came to the conclusion that this practice prevailed and existed, but that there was nothing in the authorities to extend it to the case of a member of the public writing a letter to a newspaper. Accordingly, he was of opinion that Lewis J. had properly allowed the interrogatory. I do not think it is necessary to refer in detail to the learned judge's judgment. Mr. Lawson contends that the defendant Hoby in the present case is on exactly the same footing as the defendant Orum in that case. He says they are both persons who have committed a tort jointly with the proprietors of the two newspapers. He says it is quite irrelevant that one of them is the servant of the proprietor of the newspaper in question and that in the other case he was not in that relation to the newspaper.

I think Mr. Lawson is in a difficulty with regard to this appeal for this reason, that we have no information as to the

(1) [1937] 2 K. B. 690.

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reasons for which the judge disallowed this interrogatory. The allowing or disallowing of an interrogatory in a particular case is a matter purely within the discretion of the judge in chambers. If the judge had intimated, or if we were driven to the conclusion that he must have disallowed this interrogatory purely on the ground that he considered that, as a matter of law, the defendant Hoby was entitled to the protection which had been accorded to the proprietors and publishers of newspapers, then I think the case would have required more detailed consideration and that it would have been necessary at any rate to hear Sir Valentine Holmes on that matter. I express no opinion as to what the ultimate result might have been. But as this is a pure matter of discretion and as there is nothing in my view in the material before us to indicate that the judge dealt with this as a matter of law, by which he was bound, and that he did not exercise his discretion at all, I think we ought to assume that the judge did deal with it as a matter within his discretion. If that is so, and if he did deal with it as a matter within his discretion, there is nothing in my view to indicate that he did not exercise his discretion judicially or on proper material. I think it was quite open to him to take the view that, recognizing the existence of this practice in the cases of the proprietors and publishers of newspapers, recognizing that the rule of practice had grown up in what was considered to be the public interest, as a matter of discretion, he should not allow an interrogatory to be administered to a gentleman in the position of Mr. Hoby, which would have the effect to all intents and purposes of nullifying the usefulness of this rule of practice, which existed. I think if he disallowed the interrogatory in the exercise of his discretion on grounds of that kind, as I think he may well have done, no complaint could be made.

Thinking, as I do, that there is nothing in this case to show that the judge either failed to exercise his discretion judicially or that he erroneously considered himself bound by some unalterable rule of law, I think this appeal fails.

LORD GREENE M.R. I agree. I only wish to say one thing as to the procedure adopted rather than the subject of the appeal. On the application to deliver interrogatories to Mr. Hoby, he swore an affidavit which showed on the face of it that he was a paid servant of the newspaper and that the information he had obtained had been obtained by him in that capacity. The plaintiffs thought fit to apply to cross-examine him upon that affidavit. The adjourned hearing of that application took place in the presence of Mr. Hoby and it was obvious to everybody, I think, that if a discussion had been entered into as to whether or not it was proper in respect of an affidavit sworn in interlocutory proceedings to allow cross-examination, having regard to certain matters, it might have involved a great deal of delay. The result of that was that Mr. Hoby being there he was in fact cross-examined then and there, and that was a very reasonable course to be taken and acquiesced in by all parties. It need not be thought, therefore, that I am making any comment on the practice that was followed on the facts of this particular case, but I am bound to say that I am happy to hear from Sir Valentine Holmes that in his experience it is not the practice, in the absence of special circumstances at any rate, to allow cross-examination on an affidavit of this kind sworn in interlocutory proceedings. It appears to me that if such a practice existed, it might be said to be a deplorable one, because it would mean that actions of this kind are subject to the multiplication of expense by cross-examination in interlocutory proceedings. The question of whether or not cross-examination ought to be allowed is a matter of discretion. I only express the hope, if I may properly do so, that in interlocutory proceedings no such order will be made in the absence of special circumstances of some kind. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Kimber & Co., for Canning & Kyrke, Chard, Somerset.*

Solicitors for defendants: *Simmons & Simmons.*

C. G. M.

RIORDAN *v.* MINCHIN.

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1948
July 29.

Tucker, Bucknill and Somervell L.JJ.

Landlord and tenant—Rent restriction—Furnished letting—Excess rent—Application for repayment—Applicant no longer tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 9 *sub-s.* 1*—Rent and Mortgage Interest Restrictions Act,* 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1*—Rent and Mortgage Interest Restrictions Act* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*b*).

An application under s. 9, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for repayment of excess rent paid over a period in the past may be made by a person who was the tenant of the premises during that period notwithstanding that, at the time of the application, he is no longer tenant.

Quaere whether on the true construction of s. 10, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act, 1923, s. 9, sub-s. 1 of the Act of 1920 is applicable to all lettings of furnished premises, as originally excluded from the operation of the Rent Restriction Acts by s. 12, sub-s. 2 of the Act of 1920, or only to those where the amount of the rent attributable to use of the furniture forms a substantial portion of the whole rent, which more restricted class of lettings alone is, by s. 10, sub-s. 1, of the Act of 1923, now excluded from the operation of the Rent Restriction Acts.

APPEAL from Farnham county court.

The appellant applied to the county court under s. 9, sub-s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, (1) and as applicable by virtue of the latter Act to the premises in question, for repayment of excessive rent paid to the respondent landlord for a house.

On October 29, 1946, when the applicant was still a tenant of the house, which was furnished when let to him, he referred his tenancy to the local rent tribunal under the Furnished Houses (Rent Control) Act, 1946. The tribunal reduced the rent from 30*s.* to 10*s.* 6*d.* a week. Though the house was furnished when let, it had been held in other proceedings that the amount of the rent attributable to the furniture was not

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(1) By s. 9, sub-s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920., as amended by the Rent and Mortgage Interest Restrictions Act, 1923 and 1939: "Where any person lets, or has, since the beginning of the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1939, let any dwelling-house to which this Act applies, or any part thereof, at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the tenant that the rent charged is yielding or will yield to the landlord a profit in excess of the normal profit as hereinafter defined, the court may order that the rent, so far as it exceeds such sum as would yield such normal profit shall be irrecoverable, and that the amount of any payment of rent in excess of such sum which may have been made in respect of any period after the commencement of the Rent and Mortgage Interest Restrictions Act, 1939, shall be repaid to the tenant."

" a substantial portion of the whole rent " within the meaning of s. 10, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act, 1923, and that it was therefore, though furnished when let, kept within the operation of the Rent Restriction Acts by s. 3, sub-s. 2 (*b*) of the Act of 1939. An order for possession was made against the applicant, and he was evicted on May 19, 1947. On the present application the county court judge found that he was from that date neither a contractual nor a statutory tenant, and he held that the application under s. 9, sub-s. 1 of the Act of 1920 was accordingly not competent.

The applicant appealed.

The applicant appeared in person.

Barry Sheen for the landlord.

SOMERVELL L.J., [asked by TUCKER L.J.to give judgment first read s. 9, sub-s. 1, of the Act of 1920 as amended, and continued :] The applicant was not asking, in his application under s. 9, sub-s. 1, to have the rent reduced, for the very good reason that, at the time of his application, he was no longer a tenant of the premises. The question is whether he can apply under the sub-section for repayment of excess rent, he not being tenant at the time of his application. A somewhat similar point has just come before this court in *Roppel* v. *Bennett* (1). There the applicant for repayment of excessive rent was still the tenant, but the rent had at the time of the application been reduced by a rent tribunal to a sum of which he was not complaining. Therefore, he was seeking, not to operate the first part of the sub-section which says that the rent may be reduced, but, under the second part, to recover arrears of rent in respect of a period before the rent was reduced. The county court judge there found that he was entitled to recover the excess, and this court affirmed the decision.

Observations were made by the court with regard to the words " is yielding " or " will yield " in s. 9, sub-s. 1, because an argument had been based on the fact that there were no words in the sub-section which expressly referred to the past. I pointed out in my judgment that it is quite normal in such a statutory provision to find the present tense. Under our procedure it is the normal case that a plaintiff issues a writ and claims relief and damages in respect of something which has

(1) Ante p. 115.

happened in the past. No express words in the past tense are needed to authorize a person to whom a statute gives a remedy or relief of some kind to claim in respect of the past. We held that the application would lie.

Here the county court judge has dismissed the application on the ground that at the time of his application the applicant was no longer a tenant. Counsel for the landlord relied on the words " on the application of the tenant." I do not think that they mean that the applicant has to be a tenant at the time when he files an application under s. 9, sub-s. 1, in the county court. I think that they mean that he must have been the tenant during the period in respect of which the application is made : an applicant would not be able to make an application for repayment except in respect of a period during which he had been a tenant and was paying rent. That is, I think, the natural construction of the sub-section, and I can see objections which might well arise if it were construed as counsel asks us to construe it : it would be an unfortunate construction if, after a dispute had arisen, and the landlord had realized that the tenant might be going to apply under s. 9, sub-s. 1, he could prevent him by eviction from applying in respect of a past period during which he had been paying excessive rent.

In my opinion, that point fails, and the county court judge was wrong in holding that this application would not lie because the applicant was not the tenant at the time when he filed it.

Counsel further argued that s. 9, sub-s. 1 of the Act of 1920 refers to premises " let at a rent which includes payment in " respect of the use of furniture,"' and that s. 12, sub-s. 2, uses those same words to define the class of house which was excluded from the Acts. By proviso (i.) to s. 12, sub-s. 2, of of the Act of 1920, " This Act shall not, save as otherwise " expressly provided, apply to a dwelling-house bona fide let " at a rent which includes payment in respect of . . . . use " of furniture." Therefore, the two codes were alternative. If the rent included a payment in respect of furniture, the house was outside the Acts and the tenant could not claim the ordinary protection given by them. In that case, he could proceed under s. 9, sub-s. 1. No question of standard rent would arise, but he could have an unreasonably high rent reduced to a figure which would give the landlord a normal return.

By s. 10, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act, 1923, proviso (i.) to s. 12, sub-s. 2 of the Act of

1920 was modified: for a house to be excluded from the Acts it was no longer enough to show that payments were made in respect of the furniture: the amount of the rent attributable to the furniture had to be " a substantial portion " of the whole rent." Section 10, sub-s. 1 of the Act of 1923 begins, " for the purposes of proviso (i.) to s. 12, sub-s. 2 of " the Act of 1920, and appears to leave s. 9, sub-s. 1, unamended and still applicable to all houses in respect of which it can be said that there is a payment in respect of furniture, whether or not it amounts to a substantial portion of the whole rent. Counsel submitted that s. 9, sub-s. 1, could not be regarded as so applicable, and he pointed out that, unless that sub-section be regarded as restricted to houses which, under the code as amended, are excluded from the protection of the Acts, very great difficulties will arise: if a house is within the Acts—in that, although there is some furniture in it, the furnished letting is not within s. 10, sub-s. 1 of the Act of 1923—then the rent is already fixed as the standard rent, which can be determined by objective facts, and if s. 9, sub-s. 1 of the Act of 1920 can then be invoked there will be a conflict. I do not think that point open to the landlord on this appeal. If it had been taken below, the result would have been that the applicant could have amended his claim and have sought to recover, on the standard-rent basis, what, I should think, would be substantially the same sum. If the landlord proposed saying that s. 9, sub-s. 1, did not apply, the applicant could have altered the form of his claim to one for excess over the standard rent which the landlord had exacted from him during the same period, a limitation of two years being prescribed by s. 8, sub-s. 2, of the Act of 1923 as amended by s. 7, sub-s. 6, of the Rent Restriction Act of 1939. Therefore, it is too late for counsel to take that point in answer to that application.

My conclusion is that the judge's reason for dismissing the application was wrong, and that the appeal must be allowed. The applicant is entitled to repayment of the excess rent as from the appropriate date, whatever it may be.

TUCKER L.J. I agree. I think, having regard to the course which the case took in the court below, that it is not now open to the landlord to argue that s. 9, sub-s. 1 of the Act of 1920 cannot apply to lettings in which no substantial portion of the whole rent is attributable to the furniture so that they remain within the Acts. I desire to keep that

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question open. It is obviously one which may require very careful consideration if and when it arises.

With regard to the main point argued before the county court judge, I think that the recent decision of this court in *Roppel* v. *Bennett* (1)—where we held, taking into account the words "is yielding or will yield," that s. 9, sub-s. 1 of the Act of 1920 is applicable to a past period, that is to say, a period anterior to the date when the application is made to the county court—really decides this appeal; for, if the words "is yielding" mean "yields at the material time" (as we held in effect) then, I think, the fact that this relief can only be given on the application of the tenant does not assist the landlord's argument, for the natural reading of the word "tenant" or "landlord" in proceedings of this kind is the person who was the tenant or landlord at the time when the matter in issue arose. I agree that this appeal succeeds.

BUCKNILL L.J. I agree.

Appeal allowed.

Solicitors for the landlord: *Stevens & Bolton, Farnham.*

(1) Ante. p. 115.

R. C. C.

C. A.
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Scott, Cohen and Wrottesley L.JJ.

JOBBINS *v.* MIDDLESEX COUNTY COUNCIL.

Local government — Superannuation — Officer holding two concurrent appointments—Calculation of superannuation allowance — Local Government Superannuation Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 68), *s.* 3, *sub-ss.* 1, 2; *s.* 8, *sub-ss.* 1, 2, 3, 5, 6, 7; *s.* 10, *sub-ss.* 1, 6; *s.* 12, *sub-ss.* 1, 2; *s.* 27, *sub-s.* 1; *s.* 40, *sub-ss.* 1, 3.

During the five years immediately preceding his retirement on November 2, 1943, J., who was admittedly at all material times a contributory employee for the purposes of the Local Government Superannuation Act, 1937, had rendered service in two separate employments under the same local authority, namely, the employment of area officer and the employment of interim superintendent registrar. The service in the employment of area officer was rendered continuously throughout the whole of the period of five

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

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years. The service in the employment of registrar was only rendered for a portion of the period of five years, for it had begun to be rendered on April 30, 1938, and it had ceased to be rendered on June 30, 1940. On his retirement on November 2, 1943, J. had become eligible for a superannuation allowance under s. 8, sub-s. 1 (*b*), of the Act of 1937, as he had on that date attained the age of sixty years and had completed forty years' service in accordance with that paragraph.

Sub-section 2 of s. 8 of the Act of 1937, provides that a superannuation allowance shall be made to a contributory employee on the scale that he should receive one-sixtieth of his average remuneration in respect of every completed year of contributing service. By sub-s. 5 it is provided that the average remuneration means the annual average of the remuneration received by the contributory employee in respect of service rendered during the five years immediately preceding the day on which he ceases to hold his employment in the case where he has not attained the age of sixty-five years.

J. claimed that not only the remuneration he had received during the five years in respect of his service as area officer, but also the remuneration which he had received during that period as interim superintendent registrar, should enter into the calculation for the purposes of computing what was his average remuneration during that period within the meaning of sub-s. 5. The local authority refused to accept J.'s claim, and they relied on s. 40, sub-s. 3, of the Act as a reason for such refusal. That sub-section provides that where an employee holds under a local authority two or more employments of such a nature that he can cease to hold one without ceasing to hold the other or others the provisions of the Act, unless the context otherwise requires, shall apply to him in relation to each of those separate employments as if the other or others were an employment or employments under another authority. The local authority contended that by reason of that sub-section J. must be deemed to have rendered service as interim superintendent registrar notionally under another authority and, therefore, the remuneration which he had received for that service must be treated as entirely separated from the service rendered by him in the employment as area officer and therefore could not enter into the calculation of what was his average annual remuneration during the five years within the meaning of s. 8, sub-s. 5, as he had not held more than one employment continuously for the prescribed forty years.

Held, that although s. 40, sub-s. 3, indicated that another employment under the same local authority was to be regarded as an employment notionally under another authority, nevertheless, the word " service " as defined in s. 40, sub-s. 1, meant " service " rendered to any local authority," therefore where one found the word " service " in any provision it had to be construed as service rendered to any local authority whether successively or contemporaneously. There was something, therefore, in the context which prevented the word service being limited to the service of any particular authority. It was apparent that apart from s. 40,

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sub-s. 3, J. would have been entitled to have his remuneration as interim superintendent registrar taken into account in making the calculation required by s. 8, sub-s. 5, but in view of the interpretation given to the word " service " in s. 40, sub-s. 1, namely " service rendered to any local authority " there was not sufficient indication of any intention in s. 40, sub-s. 3, that concurrent employments should be treated separately. J. was therefore entitled to claim that the remuneration received by him in respect of his service as interim superintendent registrar should be taken into account for the purpose of calculating his average annual remuneration during the five years within the meaning of s. 8, sub-s. 5, of the Act.

Held by Scott L.J., that sub-s. 3 of s. 40 of the Act of 1937 was merely an interpretation sub-section and unless there was clear language having the opposite effect, and there was no such language, that sub-section should be construed as not cutting down the main provisions of the operative part of the Act which were contained in s. 3, sub-s. 1 and s. 8, sub-ss. 1 and 2 (*b*) of the Act.

In carrying out his duties as interim superintendent registrar J. incurred certain expenses including the expense of paying the salary of his deputy.

Held that the gross fees which J. received in respect of his employment as interim superintendent registrar should be taken into the account for the purpose of calculating the average annual remuneration and the local authority was not entitled to claim that his expenses should be deducted before bringing into such account the fees received in respect of that employment.

Decision of the Divisional Court [1948] 1 K. B. 392 reversed.

Appeal from the Divisional Court (1).

This case came before the Divisional Court in the form of a case stated by the Minister of Health under s. 35 of the Local Government Act, 1937.

The appellant entered the service of the Willesden Board of Guardians in February, 1900, and made contributions for superannuation under the Poor Law Officers' Superannuation Act, 1896. He was transferred to the service of the respondent council in 1930 under the Local Government Act, 1929, and elected to remain subject to the Act of 1896 for the purposes of superannuation. From 1930 the appellant was employed by the respondent council as local public assistance officer until 1935, when he was appointed area officer. He continued to serve in the last-named capacity until November 2, 1943, when, having attained sixty years of age, and having rendered forty-three years' continuous service, he retired. In addition to his employment as stated above the appellant held the office

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of deputy superintendent registrar of births and deaths for the Willesden registration district from January 1, 1914 to April 30, 1938. On the latter date the superintendent registrar for the Willesden district died and the appellant became interim superintendent registrar by virtue of s. 25 of the Births and Deaths Registration Act, 1874. He continued to hold that appointment, in which he was remunerated by fees, until June 30, 1940, when another person was appointed superintendent registrar. On the appellant becoming interim superintendent registrar he submitted that he was a superintendent registrar within the definition of "officer" in the Act of 1896, and that contributions should be made by him under that Act in respect of his fees. The respondent council, after consideration, decided that that contention was incorrect and certain contributions made by the appellant in respect of that office were returned to him. On April 1, 1939, the Act of 1896 ceased to apply to the appellant by virtue of s. 32 of the Local Government Superannuation Act, 1937, which came into operation on that date, and he became a contributory employee of the respondent council in respect of his employment as area officer. At first the council did not regard him as a contributory employee in respect of his employment as interim superintendent registrar even after April 1, 1939. In view, however, of the decision in *Algar* v. *Middlesex County Council* (1), they had to admit that he should as from April 1, 1939, have been treated as a contributory employee under s. 3, sub-ss. 1 and 2 (*d*) of the Act of 1937 (2) in respect of such employment. Before

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(2) Local Government Superannuation Act, 1937, s. 3, sub-s. 1: "On and after the appointed day "all such persons as are mentioned in the next succeeding "sub-section shall, subject to the "provisions of this section and to "the provisions of Part III of this "Act relating to officers appointed "in a temporary capacity be "entitled to participate in the "benefits of the appropriate "superannuation fund maintained "under this part of this Act and "persons so entitled shall . . . . "contribute to that fund in "accordance with the provisions "of that section." (i.e., s. 6.) "In this Act the expression 'con-"'tributory employee' means a "person who is for the time being "entitled to participate in the "benefits of such a superannuation "fund."

Sub-section 2: "The persons "referred to in the preceding sub-"section are (*a*) every whole-time "officer of a local authority "specified in Part I of the First "Schedule to this Act who are a "local Act authority; . . . . "(*d*) every registration officer "acting in or for a district in "relation to which registration "functions are discharged by a "local authority who are not a "local Act authority . . . ."

the Divisional Court, however, they contended that their refusal to regard him as a contributory employee in respect of that employment before April 1, 1939, was justified.

Section 8, sub-s. 1 : "Subject "to the provisions of this Act, a "contributory employee of an "employing authority shall be "entitled on ceasing to be em"ployed by them to receive an "annual superannuation allow"ance if he either (*a*) has completed "ten years' service and is incapable "of discharging efficiently the "duties of his employment by "reason of permanent ill-health "or infirmity of mind or body; "or (*b*) has attained the age of "sixty years and completed forty "years' service; or (*c*) has "attained the age of sixty-five "years and completed ten years' "service."

Sub-section 2 : "The super"annuation allowance to be "made to a contributory employee "under this part of this Act shall "be on the following scale, that is "to say : (*a*) in respect of "every completed year of con"tributory service, one-sixtieth of "his average remuneration ; (*b*) in "respect of every year of non"contributing service, one one"hundred - and - twentieth of his "average remuneration : . . . ."

Sub-section 3 : "No superan"nuation allowance under this "part of this Act shall exceed "two - thirds of the employee's "average remuneration."

Sub-section 5 : "For the pur"poses of this section the average "remuneration of a contri"butory employee means the "annual average of the remuner"ation received by him in respect "of service rendered during the five "years immediately preceding the "day on which he ceases to hold "his employment or the day on "which he attains the age of sixty"five years whichever is the "earlier :

"Provided that—

". . . . (*c*) if a contributory "employee in the whole-time "employment of a single local "authority become a contributory "employee in the part-time em"ployment of each of two or more "authorities, then, if his remuner"ation in his whole-time employ"ment becomes material for the "purpose of calculating the super"annuation allowance payable "to him on his ceasing to "hold one of his part-time "employments that remuneration "shall for the purposes of the "calculation be treated as attri"butable to those part-time em"ployments and shall be appor"tioned between them."

Section 10, sub-s. 1 : "A con"tributory employee of an em"ploying authority who, before "becoming entitled to a superan"nuation allowance under this "part of this Act ceases to be "employed by that authority for "any reason other than his volun"tary resignation or dismissal in "consequence of inefficiency or an "offence of a fraudulent character "or misconduct, shall be entitled "to receive out of the appropriate "superannuation fund a sum equal "to the aggregate of his con"tributions to the fund, together "with compound interest thereon "calculated to the date on which "he ceased to hold his employ"ment at the rate of three per "cent. per annum with half"yearly rests."

"Sub-section 6 : "Notwithstand"ing anything in the foregoing

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The appellant contended that the fees paid to him under s. 27 of the Act of 1874, as interim superintendent registrar, should have been taken into account for the purpose of calculating his average remuneration for superannuation within the meaning of s. 8, sub-s. 5, of the Act of 1937. The respondent council decided that they should not be taken into account, and the appellant referred the matter to the Minister of Health and requested him to state a case to the Divisional Court.

The main question submitted for the opinion of that court was whether for the purpose of calculating under s. 8, sub-ss. 1 and 2, of the Act of 1937 the amount of superannuation allowance payable to the appellant it was incumbent on the respondent council to include in his average remuneration as defined by s. 8, sub-s. 5, of that Act certain fees received by him as interim superintendent registrar of births and deaths in so far as such fees were remuneration as defined by s. 40, sub-s. 1.

The Divisional Court held that as the appellant during the whole of the period when he was holding the employment of interim superintendent registrar was an employee holding

“provisions of this section, no payment shall be made thereunder to an employee of a local authority who leaves their employment in order to enter the employment of another local authority in such circumstances that a transfer value if payable in respect of him under the relevant provisions of Part III of this Act.”

Section 40, sub-s. 1 — In this Act:

“. . . . ‘remuneration’ means all salary, wages, fees, poundage and other payments paid or made to an employee as such for his own use . . . .”

“. . . . ‘service’ means service rendered to any local authority after attaining the age of eighteen years and before attaining the age of sixty-five years, and includes, in the case of a contributory employee who first became subject to provision for a superannuation on the appointed day and had then attained the age of sixty-five years, service rendered after attaining that age and before the appointed day, but does not include service in any employment if the person in question has already become entitled in respect of that service in that employment to a superannuation allowance under this or any other Act.”

Sub-section 3: “Where an employee holds under a local authority two or more separate employments of such a nature that he can cease to hold one without ceasing to hold the other or others, the provisions of this Act, shall, unless the context otherwise requires, apply as respects him in relation to each of those separate employments as if the other or others were an employment or employments held by him under another authority.”

under a local authority two separate employments within the meaning of s. 40, sub-s. 3, of the Act of 1937, for he also held the employment of area officer, therefore, in accordance with that sub-section the provisions of the Act applied to him in relation to each of those separate employments as if the other were an employment under another authority. Consequently, when assessing the appellant's superannuation allowance as area officer under the respondent council the remuneration paid to him by fees in respect of his employment as interim superintendent registrar notionally by another employer ought not to be taken into account. Section 40, sub-s. 3, was, therefore, a complete answer to the appellant's claim.

A second question was raised by the case but it only became material if the main question was answered in the appellant's favour, and as the Divisional Court had not answered the main question in the appellant's favour, the second question had not been answered by that court.

The second question was as follows—If the court was of opinion that the appellant's fees as interim superintendent registrar should be taken into account in computing his average remuneration within the meaning of s. 8, sub-s. 5, then should the gross fees received by him in respect of that employment be taken into such account, or should there be taken into such account only those fees less any expenditure incurred by him in the performance of his duties including the salary paid by him to his deputy ?

The appellant H. W. Jobbins in person.

I understand that counsel for the respondents is prepared to concede that I should have been treated as a contributory employee for the whole of the period during which I held the employment of interim superintendent registrar, namely from April 30, 1938, until June 30, 1940. Accordingly I now merely have to show that the remuneration which I received in respect of that employment should enter into the calculation of what was the annual average of the remuneration received by me in respect of service rendered during the five years immediately preceding the date of my retirement, namely, November 2, 1943, as provided by s. 8, sub-s. 5, of the Act of 1937.

During the whole of those five years I was a contributory employee holding the appointment of area officer, and for a period during those five years, namely, from November 2, 1938, until June 30, 1940, I was also a contributory employee holding the appointment of interim superintendent registrar of births and deaths.

I submit that no matter how many appointments an employee has held at one time during the five years' period or how many authorities he has served at one time during that period the remuneration received from each appointment has to be aggregated in order to calculate the average yearly remuneration received during the five years. Sub-section 6 of s. 8 of the Act provides: "For the purposes of sub-s. 1 of this section" (i.e., the sub-section dealing with the length of service required to qualify for a superannuation allowance) "an employee's "service shall be calculated by aggregating all periods of "service." Sub-section 7 provides: "For the purpose of "sub-s. 2 of this section" (i.e., the sub-section dealing with the scale of the superannuation allowance in proportion to the number of years of contributing service) "(*a*) an employee's "contributing service shall be calculated by aggregating all "periods of such service." Sub-section 5 of s. 8 provides that ". . . . the average remuneration of a contributory employee "means the average of the remuneration received by him in "respect of service rendered during the five years . . . ." Consequently, when one reads sub-ss. 6 and 7 together with sub-s. 5, it appears that all periods of service are to be aggregated, and that the average remuneration is based in the aggregated service during the five years. That comes to the same thing as providing that all remuneration received at the same time over the period of the five years should be aggregated. Consequently, my remuneration as interim superintendent registrar during the period November 2, 1938 to June 30, 1940, should be aggregated with my remuneration as area officer during the same period, because that period fell within the five years preceding the date of my retirement, namely, November 2, 1943.

Section 27, sub-s. 1, provides that: "Every registration "officer shall be deemed for the purposes of this Act . . . . to "be an officer in the employment of the local authority dis-"charging registration functions in relation to the district in "as far which the officer acts." Consequently, whatever may be the effect of s. 40, sub-s. 3, on other appointments, I submit that s. 27, sub-s. 1, should prevail and have the effect of taking the appointment of registration officer out of the ambit of s. 40, sub-s. 3.

Moreover, the whole of s. 40 is merely an interpretation section and, therefore, a general section like s. 27 should prevail over s. 40.

H. B. Williams K.C. and *J. Ramsay Willis* for the respondent. I concede that as the 1937 Act was not in force before April 1, 1939, and therefore, s. 40, sub-s. 3, of that Act could not apply to the appellant before that date, then if he had ceased to hold his office as registrar between November 2, 1938 and April 1, 1939, he would have been entitled to the superannuation allowance on the basis on which he claims it now. It is desired to argue this case on the basis that *Algar* v. *Middlesex County Council* (1) was rightly decided, while reserving the point in the event of that case proceeding to a higher court. It is, therefore, also conceded for the purposes of this case that the appellant should have been treated as a contributory employee in respect of the office of interim superintendent registrar under s. 3, sub-s. 1, and sub-s. 2, of the Act of 1937, from April 1, 1939, until he gave up that office on June 30, 1940.

It is submitted that s. 8, sub-s. 5 and s. 40, sub-s. 3, of the Act of 1937, illustrate a principle which defeats the appellant's claim. Section 40, sub-s. 3, means that the whole of the Act, unless the context otherwise requires, is to apply as if each appointment were held under a separate authority. To appreciate the meaning of this sub-section, it is convenient to assume that the appellant was employed by the respondent council as an area officer and by the X council as an interim superintendent registrar, for the sub-section requires one of such appointments to be notionally held under another authority. Accordingly, when on June 30, 1940, he ceased to hold the appointment of interim superintendent registrar, he could not possibly have been entitled to any superannuation allowance in respect of that appointment, for he had not rendered continuous service under authority X for forty years, whereas, to be entitled to any superannuation allowance an employee must, under the provisions of s. 8, sub-s. 1, of the Act of 1937, have rendered service to the notional authority X for at least forty years, unless he retired for ill-health et-cetera, or had reached the age of sixty-five years, which was not the case here.

It was to provide for such a case as this where the employee ceases to be employed, but has failed to render service for the necessary number of years to qualify for a superannuation allowance that the legislature has, by s. 10, sub-s. 1, of the Act of 1937, provided that where a contributory employee ceases to be employed in circumstances similar to those of this case, he shall be entitled to a return of all his contributions, plus compound interest as therein mentioned. I realize that this is a case where the employee would not be in a position to claim a return of contributions, because all contributions he made in respect of the service rendered to the notional authority were returned to him as the respondents' attitude was that he was not a contributory employee in respect of his appointment as interim superintendent registrar, and since they returned those contributions in May, 1939, they had refused to accept further contributions from him in respect of that appointment. It is, however, necessary in order to deal with the appellant's contention to assume that he was in the position of a contributory employee and had paid the appropriate contributions in respect of his appointment as interim superintendent registrar. If that had been done the contributions would have been refunded.

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Therefore the appellant by his claim is really contending that if he had made all the necessary contributions in respect of his appointment as interim superintendent registrar he would have been entitled not only to a separate superannuation allowance from the notional X council, but also in addition to a return of his contributions. It is quite clear that the general scheme of the Act is against such a contention.

We, therefore, submit that by reason of s. 40, sub-s. 3, the appellant would only have been entitled in respect of his appointment as interim superintendent registrar, to a return of any contributions he had made, but as such contributions have already been returned, he is entitled to nothing in respect of that appointment, and is certainly not entitled to any superannuation allowance in respect thereof.

COHEN L.J. [His Lordship stated the facts and continued :] Before I refer to the judgment in detail, it will be convenient to go through the relevant provisions of the Act of 1937. Section 1 imposes on local authorities and other bodies mentioned in the section, the obligation to establish a superannuation fund. (His Lordship then read s. 3, sub-s. 1 and sub-s. 2 (*a*), (*d*), which deal with the meaning of " contributory " employee " and the different classes of persons who come within that meaning ; and continued :) There is no dispute that the appellant is a " contributory employee " within the meaning of the Act. Then I come to s. 8, which is the vital section we have to construe. It deals with the " eligibility

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"for superannuation allowance," and the scale of allowances. [His Lordship then read sub-ss. 1 and 2 of s. 8.] Sub-section 3 provides—"No superannuation allowance under this part of "this Act shall exceed two-thirds of the employee's average "remuneration." [His Lordship then read sub-s. 5 and continued :] Then come various provisoes, and I think I need only refer to one, namely, proviso (*c*) which is in these terms—"if a contributory employee in the whole-time employment of a "single local authority becomes a contributory employee in the "part-time employment of each of two or more authorities, "then, if his remuneration in his whole-time employment "becomes material for the purpose of calculating the "superannuation allowance payable to him on his ceasing to "hold one of his part-time employments, that remuneration "shall for the purposes of the calculation be treated as "attributable to those part-time employments and shall be "apportioned between them."

[His Lordship then read sub-ss. 6 and 7 of s. 8 and s. 10, sub-ss. 1 and 6, and continued :]

Then s. 12 deals with the "reckoning of service." Sub-section 1 provides : "A contributory employee shall be entitled "to reckon as contributing service, in relation to the employ-"ment in respect of which he is a contributory employee—"(*a*) service in respect of which he was required to contribute "to the appropriate superannuation fund ; (*b*) in the case of a "person who became a contributory employee on the appointed "day, any service which immediately before that day he was "entitled to reckon as contributing service for the purposes "of the Act of 1922 in relation to his said employment ; "and (*c*) any other service which, by virtue of any of the "provisions of this Act, or of any regulations made thereunder, "is to be reckoned as contributing service : Provided that, "subject to the provisions of this Act, a contributory employee "shall not be entitled to reckon as contributing service any "service in respect of which he has received a return of "contributions under this Act or under the Act of 1922. "(2.) A contributory employee of a local authority shall be "entitled to reckon as non-contributing service any service "which he is not entitled to reckon as contributing service." The only other sub-section to which I need refer is sub-s. 5 : "For the purpose of calculating the superannuation allowance "of a contributory employee employed whole-time in a "single employment who has formerly served as a part-time

" employee, the period of part-time service shall be treated as " though it were whole-time service for a proportionately " reduced period." Then I can pass to s. 27. [His Lordship then read s. 27, sub-s. 1, and continued :]

Section 35 provides for the reference of any dispute as to pension between employees and employers to the Minister of Health and contains a proviso : " Provided that the Minister " may at any stage of the proceedings on the reference to him, " and shall, if so directed by the High Court, state in the form " of a special case for the opinion of the High Court any question " of law arising in those proceedings." It is under that power that the special case was referred to the Divisional Court.

Now I come to the next important section in this Act, the interpretation section, s. 40, sub-s. 1, is in these terms : " In " this Act, unless the context otherwise requires," and I now refer to the relevant definitions. The first is " appointed day," which was April 1, 1939. Then " ' contributing service ' in " relation to any person means service which he is entitled to " reckon as contributing service in accordance with the " provisions of s. 12 of this Act : ' contributory employee ' " has the meaning assigned to it by s. 3 of this Act." " Local " authority " includes county councils among other bodies. Then : " ' non-contributing service ' in relation to any person " means service which he is entitled to reckon as non-con- " tributing service in accordance with the provisions of s. 12 " of this Act." Then " officer " is defined in terms which clearly show that the appellant in his character of area officer was included. " Registration officer " is defined in these words : " ' registration officer ' means a superintendent regis- " trar or registrar of births and deaths, and includes a registrar " of births and deaths exercising any of the functions of a " registrar of marriages and a person appointed by a local " authority to act as a deputy superintendent registrar or " deputy registrar of births and deaths." As I have said, having regard to the decision in *Algar's* case (1) it is not disputed in this court that he is a registration officer within the meaning of this Act. Then comes the definition of " remuneration." [His Lordship then read the definition of " remuneration," and he then read the definition of " service " :] Then " ' whole- " ' time officer ' means, in relation to any local authority, an " officer who devotes substantially the whole of his time to " their employment, and includes an officer who is employed

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"by them for a part only of his time but devotes substantially "the whole of the rest of his time to employment by one or "more other local authorities." I pause there to say that I think Mr. Williams agreed having regard to that definition that the appellant was at all times a whole-time officer.

Then comes sub-s .3 of s. 40 on which the Divisional Court based its judgment. (His Lordship read sub-s. 3 and continued :)

I turn now to the schedules. Schedule I makes it clear that the Middlesex County Council is a local authority whose whole-time officers are "to be compulsorily superannuable."

Schedule II deals in cl. 2, part I, with the transfer of poor law employees and says: "A transferred poor law employee who "(*a*) was on the appointed day in the employment of a local "authority and, having remained subject to the Act of 1896 "by virtue of the Act of 1929, was immediately before that day "still subject to the Act of 1896; or (*b*) having remained "subject to the Act of 1896 by virtue of the Act of 1929, ceased "before the appointed day to be so subject but, on or after "the appointed day and within twelve months after he so "ceased, and without having become in the interval subject "to the Act of 1922, enters the employment of a local "authority."

The only other provision I need refer to is contained in sch. IV, which deals with registration officers and provides: "The following provisions of this part of this schedule shall, "in lieu of any other provisions of this Act or of any local Act "scheme (including any definition of 'service' contained in this "Act or in the scheme), have effect with respect to the reckon-"ing of service rendered as a registration officer before the "appointed day by a registration officer who (*a*) was first "appointed as such after the thirty-first day of March, "nineteen hundred and thirty, and before the appointed day." The appellant is such a registration officer, because he was first appointed in the sense that he succeeded by reason of the death of the then superintendent registrar after March 30, 1930, and before the appointed day, and he was still in office at the appointed day. That being so, para. 2 applies: "For "the purposes of part I of this Act and of any local Act scheme "—(*b*) account shall be taken of any such service in such "manner and subject to such terms and conditions, including "conditions as to the making of payments by an employee or a "local authority, as may be prescribed."

Regulations were prescribed under the schedule. They contain nothing in any material way affecting the question we have to decide, but I ought to mention, in order to place it on record, that the Minister prescribed that a registration officer appointed as such after March 30, 1930, and before the appointed day, who was within the schedule "shall, subject "to the provisions of the Act, be entitled to reckon as con-"tributing service in relation to the appointment in respect "of which he so became a contributory employee any service "rendered by him as a registration officer before the appointed "day which immediately before that day would have been "treated as service for the purposes of the Act of 1896." The effect of that was that the appellant became entitled to have reckoned as contributing service the service he rendered to the county council between April 30, 1938, when he succeeded to the deceased superintendent registrar, down to the coming into force of the 1937 Act on April 1, 1939. There can be no question that had he resigned both offices before that date in that period he would have been entitled to have his remuneration in both capacities taken into account, because there was no provision in force corresponding to s. 40, sub-s. 3 of the 1937 Act. He did not so retire. He retired on November 2, 1943. He had previously vacated the office of registration officer by reason of the appointment of a successor on June 30, 1940.

In those circumstances, the Divisional Court decided that he was not entitled to have taken into account in ascertaining his average remuneration under s. 8, sub-s. 5, remuneration which he received for the five years preceding November 2, 1943, in the capacity of registrar. They seem to have treated the express language of s. 40, sub-s. 3, as excluding that claim. Unfortunately, their judgment does not show the nexus by which they reached that conclusion and, therefore, I feel bound to examine the section for myself unassisted by any full statement of the reasons of the Divisional Court for their conclusion.

It is to be observed that s. 40, sub-s. 3, is an interpretation section and provides nothing more than (in accordance with its express term) that "the provisions of this Act shall, unless "the context otherwise requires, apply as respects him in "relation to each of those separate employments as if the other "or others were an employment or employments held by him "under another authority." That means that wherever we

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come to a reference to his employment we have to consider him during the relevant period as having so held two employments, one as area officer under the Middlesex County Council, which I will call authority A, and the other under a notional authority which, in order to avoid ambiguous phrases Mr. Williams, for the respondents, referred to as authority X.

Approaching the matter in that way, I start with s. 40 and consider what "service" means. "Service" means "service "rendered to any local authority." Therefore, when construing those words, I think, wherever you find a reference to service, you have to treat it as service rendered to any local authority whether successively or contemporaneously. But you have to exclude service "in any employment if the "person in question has already become entitled . . . . to "a superannuation allowance under this or any other Act." There can be no doubt that that does not apply, because it is quite plain that on November 2, 1943, the appellant, immediately before his retirement from the service of authority A, was not entitled to a superannuation allowance from anybody.

What was his position when he ceased to be interim superintendent registrar on June 30, 1940? Since he must be treated as having held that office not under authority A, the Middlesex County Council, but under authority X, s. 10, as it seems to me, should have been brought into force. The fact that the authority, the county council, took a wrong view of the meaning of the section, as Mr. Williams very properly admitted, is immaterial. What is the position in those circumstances? The appellant was a contributory employee of authority X in his capacity as registrar, who, before becoming entitled to a superannuation allowance under that part of the Act, ceased to be employed by authority X for a reason other than his voluntary resignation. Therefore, prima facie, under s. 10, sub-s. 1, he would have been entitled to receive the payment of his contributions with compound interest thereon. He would have been so entitled unless the provisions of sub-s. 6 applied. But it was common ground that they did not apply, because, although authority X had a notional existence, there was no separate transfer fund, and there was no room for the operation of the provisions of part III relating to transfer values. The position, therefore, was that the appellant had not become entitled to any superannuation allowance, but he would have been entitled to have his contributions returned if he had made them.

What is the consequence? Before I turn to s. 8, sub-s. 5, I must look at s. 12, from which I find that he would have been entitled to reckon as contributing service for the purposes of s. 8, sub-s. 5, service in respect of which he was required to contribute to the appropriate superannuation fund, including service, both as area officer and as interim superintendent registration officer, subject to the proviso that he would not be entitled "to reckon as contributing service any service in "respect of which he has received a return of contributions "under this Act or under the Act of 1922." He would be caught by that proviso and, therefore, he could not count his service as interim superintendent registrar as a contributing service because he must be deemed to have been in the position of an employee who had made contributions, but to whom his contributions had been returned under s. 10, sub-s. 1 upon his retirement on June 18, 1940, from that employment. Under sub-s. 2 of s. 12 a contributory employee of a local authority is entitled to reckon "as non-contributing service "any service which he is not entitled to reckon as con-"tributing service." Therefore, he would have been entitled to reckon his service as interim superintendent registrar as non-contributing service.

The important provision is, however, sub-s. 5 of s. 8 and not sub-s. 2 of s. 12. Is there anything in sub-s. 5 which debars him from having his remuneration as interim superintendent registrar included in the calculation of the "annual average of "the remuneration" received by him in respect of service rendered during the five years immediately preceding the date of his retirement? "Service" must receive the definition given to it by s. 40, and there is nothing in s. 40 which excludes the service with authority X. On the contrary, the language of s. 40 refers expressly to "service with any authority." Nor is there anything in sub-s. 5 of s. 8 which says only "contributing "service" is to be taken into account. On the contrary, it is quite plain on the language of sub-s. 2 of s. 8 that remuneration for "non-contributing service" is also to be taken into account. Therefore, it seems to me, as a matter of construction, subject only to a consideration of the effect of s. 40, sub-s. 3, that the answer is quite plain. Indeed, I do not think that Mr. Williams denies that, if it were not for s. 40, sub-s. 3, the appellant would be entitled to have his remuneration as interim registrar taken into account in making the calculation required by s. 8, sub-s. 5. He admitted also that he could find nothing in the express language of s. 40, sub-s. 3, which compelled one to an opposite conclusion; but he said that it was inconsistent with the policy of the Act, and that s. 40, sub-s. 3, indicated an intention that concurrent employments should be separately treated. I am unable to find any sufficient indication of such an intention in the language of s. 40, sub-s. 3, to justify us in disregarding what I regard as the plain meaning of the other sections to which I have already referred.

The other provision on which Mr. Williams relied was that contained in proviso (*c*) to sub-s. 5 of s. 8, which deals with the position of a contributory employee in the whole-time employment of a single local authority who becomes a contributory employee in part-time employment of each of two or more authorities, and provides "if his remuneration in his whole-"time employment becomes material for the purpose of "calculating the superannuation allowance payable to him on "his ceasing to hold one of his part-time employments, that "remuneration" shall be apportioned. That seems to me to be quite a different matter. It provides for his remuneration being apportioned and thus avoids its being brought into account twice.

Here we are asked to say that the remuneration in the capacity of superintendent registrar shall not be brought into account at all. I do not think it would be safe for us to draw any inference from that section adverse to the contention put forward by the appellant.

Finally, it was said that, if we reach the conclusion that the appellant's contention is well founded, it would necessarily follow that we should have to hold in an imaginary case which Mr. Williams put to us that an employee might become entitled to twice the pension which Parliament obviously intended him to have. The case Mr. Williams put was this. He supposed that a contributory employee was employed part-time in the service of authority A at a salary of 800*l.* a year, and part-time in the employment of authority B at a salary of 700*l.* a year and he had retired on attaining the age of sixty years, having served in each employment for an aggregate period of at least forty years. In order to exclude proviso (*c*) of sub-s. 5 of s. 8 he assumed that both employments had been held continuously for at least five years previously to retirement, and he assumed that the employee retired simultaneously from both employments. He had to do that, otherwise the monstrous state of affairs which he visualized would have been prevented by the operation of the definition of "service" in s. 40, sub-s. 1. Then he said, on the basis of the appellant's argument, the employee would be entitled from authority A to forty-sixtieths of the combined salaries of 800*l*. and 700*l*. and from authority B to the same amount. In other words he would receive on retirement a pension of 2,000*l*. or 500*l*. a year more than his salary; or, rather, he would have received that pension if it was not reduced to two-thirds of 1,500*l*., that is to say 1,000*l*. a year, by reason of the operation of sub-s. 3 of s. 8, but he contended that that sub-section only applied to the case where the superannuation allowance was being paid wholly by one local authority. In order that he might bring out the full effect of his argument my brother Wrottesley put to him a hypothetical case not of retirement after forty years under sub-cl. (*b*) of sub-s. 1 of s. 8, but of retirement after ten years owing to ill-health, in which event, on the facts suggested, he would receive a pension of twice the amount contemplated because even so calculated it would not amount to two-thirds of the employee's remuneration. My first comment on that supposed case is that it would arise whether or not the appellant's argument was well founded, because s. 40, sub-s. 3, does not come into it. I can find nothing in the terms of the section to prevent its operation, but I think it is possible that we could here find a general policy in the Act which might prevent such an unfortunate result occurring. It might well be said that it was implicit in the concluding words of the definition of "service," that a man should not receive two superannuation allowances in respect of the same service. That is quite a different proposition from that which Mr. Williams found himself compelled to argue in this case, because he has invited us to hold that this man will not have his service taken into account for one pension, because it is not suggested that the appellant has ever had his remuneration as interim registration officer taken into account in calculating his pension at all. True, in theory, he is entitled to get his contributions back, but it seems to me impossible to hold that that fact can deprive him of his right to a pension, because sub-ss. 1 and 2 of s. 12 read together indicate what the effect of a return of contributions is to be. For these reasons, I am unable to find either in the express provisions of the Act, or in the policy of the Act, sufficient justification for disregarding what I think Mr. Williams would admit is the plain meaning of the language used in s. 8 as qualified by s. 40. In my opinion the appeal should be allowed, and question 1 should be answered in the affirmative.

That being so, we have to consider a question which the court below did not have to consider, and that is the second question stated in the case: "If the answer to the preceding "question is in the affirmative, whether there should be taken "into account as such remuneration (*a*) the gross fees received "by the applicant, or (*b*) those fees less any expenditure incurred by the applicant in the performance of the duties of "that appointment, as, for example, the salary paid by him "to his deputy." I think it was common ground that that entirely depends on the construction of the definition of "remuneration" in sub-s. 1 of s. 40. I will not read it again. I think it is sufficient to say that the express language of that section seems to me to leave no doubt that that question must be answered by saying that the gross fees received by the applicant must be taken into account. There is nothing in the section binding him to pay any expenditure out of those fees. It is true that he may, in order to discharge his duties effectively have to incur expenditure, but the fees are paid to him for his own use. It was said that he would have to employ a deputy, but there is nothing which fixes the remuneration of deputies, and he might find a deputy who was prepared to act free of charge which would be a compliance with his obligation as interim registrar.

As I have said, although the alternative answer might be a reasonable solution, the language of the definition seems to me so plain that it is impossible for us to come to any conclusion other than that which I have already indicated. In my opinion, therefore, the second question also should be answered in favour of the appellant.

SCOTT L.J. I agree with the judgment of my brother COHEN L.J. on both questions. I have only one or two sentences to add. On the first question, that of liability, the position under this Act is one in which the right is laid down in the enacting section of the Act. The limitation upon which the argument for the respondents here was chiefly based is contained in s. 40, sub-s. 3, and that sub-section is in a part of the Act where one would not naturally look to find operative provisions. If there is any ambiguity in the sub-section—indeed, I go further—unless there is absolutely clear language having the opposite effect, and there was no such language, prima facie that sub-section ought to be construed as not cutting down the operative provisions of the Act which are contained in s. 3, sub-s. 1, and s. 8, sub-ss. 1 and 2 (*a*), for those provisions are enacting provisions of the Act, conferring a right to superannuation. Compared to them a definition sub-section ought not to be treated as prima facie an operative sub-section. It is a definition sub-section and no more.

I think there is some analogy between this Act and the first Workmen's Compensation Act of 1897, which was considered in the House of Lords in *Lysons* v. *Knowles* (1), to which I made reference in the course of the argument. In that Act the right was conferred by s. 1. The quantum of compensation was dealt with in the schedule. That schedule contained a provision that in certain cases the quantum of weekly compensation should be ascertained by taking the average of wages received. An argument was submitted to the county court, and to the Court of Appeal, to the effect that the word " average " showed that more than casual labour must have been in contemplation as a condition of the right to receive compensation under the Act. The Court of Appeal took that view. There was an appeal to the House of Lords. Their Lordships pointed out that that was a wrong principle of interpretation. Lord Halsbury said (2): " My Lords, the " broad proposition of course was that the legislature intended " that there should be compensation given to every workman " in certain trades when an injury happened to him in the " course of his employment, subject to certain exceptions " which are not relevant to the question now under debate." He added (3): " The first thing, I think, one has to do is to " apply one's mind to what is the substantive intention and " meaning of this statute." Then, at the bottom of the page, he says: " My Lords, for my own part I cannot entertain a " doubt that the legislature did mean that every workman " in the prescribed trades should be entitled to compensation, " and I think that is the language which one would naturally " expect to have been used by the legislature if that was the " meaning of the enactment." Then he points out that to cut that right down by reason of something in the schedule was contrary to common sense.

Lord Macnaghten took the same view, saying (4): " I have " no doubt that if Parliament had intended to impose the " condition which has been discovered in the schedule, the

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(1) [1901] A. C. 79.
(2) Ibid. 84.
(3) Ibid. 85.
(4) Ibid. 92.

"condition would have been inserted in the Act." Lord Davey says (1): "Now, my Lords, I turn to the examination "of the Act, and I entirely agree with what has been said by my "noble and learned friend on the woolsack, that you ought to "construe this Act so as, as far as possible, to give effect to the "primary provisions of it." That principle was laid down there. When the Act of 1897 was repealed and the Act of 1906 took its place, as we all remember the compensation provisions were transferred from the schedule to the body of the Act, but that made no difference to that basic interpretation which was always adhered to throughout those Acts.

In my view that principle is rightly applied to s. 40, sub-s. 3, which contains no language at all adequate to the gloss which the very able and moderate argument addressed to us by Mr. Williams necessarily endeavoured to put upon it.

There is only one other observation I want to make. We were referred to the regulations made by the Minister published in January of 1939 before the Act came into force on April 1, 1939. They were made under the provision contained in the Act itself for the making of regulations, namely, s. 36, sub-s. 6, which provides: "The Minister may make regulations for "prescribing anything which under this Act is to be prescribed, "and with respect to such administrative action to be taken "by local authorities as is mentioned in the Third Schedule "to this Act." It is to be observed that no power of delegated legislation is by that conferred upon the Minister whose regulation-making power is limited to administrative matters. The fourth part of the schedule, which has been referred to by my brother, contains, in para. 2 (*b*), a provision "For the purposes "of part I of this Act . . . . account shall be taken of any such "service in such manner and subject to such terms and con- "ditions including conditions as to the making of payments by "an employee or a local authority, as may be prescribed." Those regulations were made under that provision by reason of the word "prescribed" being defined in s. 40 as meaning "pre- "scribed by regulations made by the Minister." I express no opinion on the regulations, but they have a look rather of being something more than administration—it may be that they amount to legislation. I merely call attention to that as a caveat without expressing any final opinion.

I agree with the judgment proposed by my brother COHEN L.J.

(1) [1901] A. C. 79, 95.

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Wrottesley L.J. I agree. I should not expect to find at the end of an interpretation section a clause which would deprive the persons intended to be benefited by an Act of this kind of one of the principal benefits conferred by it. I should expect any such modification of the general principle of the Act to be contained in a substantive section.

But, nevertheless, I have sought to find somewhere in the Act a scope for working s. 40, sub-s. 3. It must have a meaning and must apply somewhere. One instance, I think, is to be found in s. 10 which, it is to be observed, says " A contributory " employee who, before becoming entitled to a superannua- " tion allowance . . . . ceases to be employed by that " authority," through something which is not his own fault, is entitled to receive back his contributions " together with " compound interest thereon " at a stated rate. Supposing the appellant in this case had paid as he ought to have paid—I think this is common ground—his contributions, he would naturally have expected to get them back on finding out on his retirement from the registration office that he was not entitled to what is called an allowance, that is, to a pension. But it is to be observed that he is still a contributory employee within the meaning of s. 10 because he has not ceased to be employed by the county council in another capacity. When one turns to s. 40, sub-s. 3, there is a passage in that subsection which enables that difficulty to be put right and enables the appellant to recover with compound interest in accordance with s. 10, sub-s. 1, any payments which he would have made in the event of the council having been willing to receive them. It provides, in effect, that in relation to his appointment as registration officer he is to be regarded as if it were employment under an authority other than the Middlesex County Council. That appears to me to be a case where s. 40, sub-s. 3 works, and works beneficially in accordance with the general purport of the Act. That is all I have to say.

Appeal allowed.

Solicitor for the respondents: *C. W. Radcliffe, Solicitor to the Middlesex County Council.*

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Tucker, Asquith and Singleton L.JJ.

ARTILLERY MANSIONS LIMITED *v.* MACARTNEY.

Landlord and tenant—Rent restriction—Possession—Flat let at a rent including payment for attendance—Amount attributable to attendance agreed between the parties—Payment as additional rent—Presumption of correctness—Whether substantial portion of the whole rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2, *proviso* (*i.*)—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1.

By an agreement in writing the plaintiffs let one of their service flats to A. at a rent of 170*l.* per annum, with a further payment, by way of additional rent, of 15*l.* a year for attendance charges. The normal charge for the services provided by the plaintiffs was stated to be 40–45*l.* a year, but special terms were granted to A. because his frequent absences from London made him unable to make full use of the services provided. Subsequently A., with the consent of the plaintiffs, assigned his tenancy to the defendant.

On an appeal by the plaintiffs against the dismissal by Denning J. of their claim for possession of the flat:—

Held, that in ascertaining under s. 10, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, what portion of the whole rent was fairly attributable to attendance, regard must be had to the value of the services to the original tenant, whose contract was under examination and not to their value to the tenant in actual occupation; that as the sum of 15*l.* fixed by the landlords admittedly did not form a substantial portion of the total rent, the flat was " not to be deemed to be bona fide let at a rent which includes payments in respect of attendance"; and that the flat was therefore protected by the Rent Restriction Acts and the claim for possession failed.

Principle laid down by Lord Simon in *Palser* v. *Grinling* [1948] A. C. 291 applied.

Decision of Denning J. [1947] K. B. 594, affirmed.

APPEAL from Denning J.

The plaintiffs were the landlords of a large block of service flats at Westminster, of which one on the fifth floor was let unfurnished, under an agreement made in June, 1944, to a Mr. Anderson for one year, and thereafter on a quarterly tenancy, at a rent of 170*l.* per annum. By reason of his work as a journalist Mr. Anderson expected that he would frequently be out of London and in consequence unable to make full use of the services provided by the plaintiffs. It was therefore agreed between the plaintiffs and Mr. Anderson that the latter, instead of paying the normal rent of 200–210*l.* per annum, inclusive of the charge for attendance (valued by the plaintiffs at 40–50*l.* per annum), he should pay by way of a further or additional rent a sum of 15*l*. a year for service charges, making 185*l*. in all. Subsequently Mr. Anderson, with the consent of the plaintiffs, assigned his tenancy to the defendant, Mrs. Macartney. A clause in the tenancy agreement provided as follows: "The service to be provided by the company "shall include keeping the rooms and furniture clean, sweeping "chimneys, cleaning windows, lighting fires, valeting and "general attendance." By another clause the company agreed to arrange for the staircase to be kept clean and to provide a hall porter to attend the hall door and to take messages and parcels. Apart from the above contractual services they also provided a storeroom for luggage, a lift and liftman, central heating and a hot-water supply. Further, there was a system whereby a housekeeper was available to cook meals for, and serve them to, tenants of the flats in the block.

On a claim by the plaintiffs for possession of the defendant's flat, the plaintiffs contended that the flat was excluded from the protection of the Rent Restriction Acts by proviso (i.) to sub-s. 2 of s. 12 of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920 (1), by reason of the fact that it was let at a rent which included a payment for attendance. The defendant, on the other hand, relied on s. 10, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923 (1).

Denning J. before whom the action was tried on March 26, 1947, held that the amount agreed upon between the plaintiffs and the original tenant as attributable to attendance must be assumed to be a genuine pre-estimate of its value and should be prima facie taken to be correct, and that as such amount did not form a substantial part of the whole rent the action failed.

The plaintiffs appealed.

Diplock K.C. and *Quintin Hogg* for plaintiffs. The House of

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(1) Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2, proviso (i.)—"This Act "shall not, save as otherwise "expressly provided, apply to a "dwelling-house bona fide let at "a rent which includes payments "in respect of board, attendance, "or use of furniture."

Rent and Mortgage Interest Restrictions Act, 1923, s. 10, sub-s. 1.—"For the purposes of "proviso (i.) to sub-s. 2 of s. 12 "of the principal Act . . . . , a "dwelling-house shall not be "deemed to be bona fide let at a "rent which includes payments in "respect of attendance . . . . "unless the amount of rent which "is fairly attributable to the "attendance . . . . regard being "had to the value of the same to "the tenant, forms a substantial "portion of the whole rent."

Lords having now given its decision in *Palser* v. *Grinling* (1) it must be accepted that for the purpose of apportionment the whole rent must be taken into account. The questions for determination on this appeal are therefore (1.) What effect is to be given to the apportionment for attendance made in the lease when that apportionment is made in circumstances peculiar to the original lessee—circumstances which are not shared by the defendant, who is an assignee of the original tenant; and (2.) Whether in apportioning "the value of the attendance to "the tenant," within the meaning of s. 10, sub-s. 1, of the Act of 1923, the court must have regard to the value to the original tenant, arising out of circumstances peculiar to him, or whether, as we submit, regard must only be had to the value to the assignee, who is in possession of the premises at the date when the contractual tenancy is determined by notice and the protection of the Acts is claimed. The learned judge below, having decided that the original apportionment contained in the lease was a genuine estimate of the value of the services to the contractual tenant, held that the plaintiffs were bound by that apportionment in regard to the defendant, the actual tenant. The evidence before the learned judge showed that the rent paid by the normal tenant of these flats was 200–210*l.* per annum, of which 40–50*l.* represented payment for attendance, and that the original tenant of the flat in question was given special terms. The like special circumstances do not apply in the case of the assignee, who is able to make full use of the attendance provided under the lease. Section 12, sub-s. 1 (*f*) of the Act of 1920 defines a "tenant" as including "any person from time to time deriving title under the original ". . . . tenant" and therefore the defendant is a tenant, and it is submitted that in ascertaining what portion of the total rent is fairly attributable to the attendance the court must have regard to its value to the assignee. The fact that a tenant does not make full use of the services provided by the landlord, to which he is contractually entitled, is irrelevant when ascertaining the value which is fairly attributable to attendance. The cost to the landlord of providing the services is not decisive, but it is a very valuable indication of the minimum value to the tenant. [*Palser* v. *Grinling: Property Holding Co., Ld.* v. *Mischeff* (2); *Engvall* v. *Ideal Flats, Ld.* (3) referred to.]

(1) [1948] A. C. 291.

(2) [1946] K. B. 631, 638; [1948] A. C. 291.

(3) [1945] K. B. 205.

Dudley Collard for defendant. The date to be taken for making the apportionment is June, 1944, that of the lease. The apportionment made between the parties to the lease is, prima facie, the one to be adopted and there is nothing in the case which would have justified the learned judge below in rejecting that prima facie evidence of what was the proper apportionment, especially as throughout the onus was on the plaintiffs to satisfy the court that another apportionment was the right one. It is not open to the plaintiffs to come now and say that the court must have regard to other figures. I am fortified in that argument by the decision of the House of Lords in *Palser* v. *Grinling* (1). The contract between the plaintiffs and Anderson was only for a limited amount of attendance, and Anderson was only entitled to pass on to the assignee that limited amount of service. The plaintiffs are estopped from saying that 15*l.* is not the value of the services to the tenant because the assignee is entitled to rely upon the terms of the lease. In *Palser* v. *Grinling* (1) Morton L.J. said: "I think "the important point is: What did the parties contemplate at "the time when the lease was granted"; and there is no conflict between that view and the view of Lord Simon in the same case.

TUCKER L.J. This is an appeal from a decision of Denning J. whereby he gave judgment for the defendant in an action in which the plaintiffs, Artillery Mansions, Ld., were claiming possession of a flat of which the defendant, Mrs. Macartney, had been the tenant—she being the assignee of the original tenant, Mr. Anderson. Mrs. Macartney's tenancy had been duly determined, and she claimed the protection of the Rent Restriction Acts. The sole question was whether or not this flat was protected, having regard to the provisions of the Acts with regard to apportioning the rent of premises where attendance is provided by the landlord.

The sections in question are these: s. 12, (i.) (*f*) of the Act of 1920, defining "tenant"—"The expressions 'landlord,' "'tenant,' 'mortgagee,' and 'mortgagor' include any person "from time to time deriving title under the original landlord, "tenant, mortgagee, or mortgagor"; s. 12, sub-s. 2, which, having enacted that "this Act shall apply to a house or a part "of a house let as a separate dwelling, where either the annual "amount of the standard rent or the rateable value does not

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(1) [1946] K. B. 631, 638; [1948] A. C. 291.

" exceed " certain specified amounts, proceeds, by proviso (i.) : " Provided that this Act shall not, save as otherwise expressly " provided, apply to a dwelling-house bona fide let at a rent " which includes payments in respect of board, attendance, or " use of furniture " ; and s. 10, sub-s. 1, of the Act of 1923, which provides, " For the purposes of proviso (i.) to sub-s. 2 " of s. 12 of the principal Act (which relates to the exclusion of " dwelling-houses from the principal Act in certain circum- " stances), a dwelling-house shall not be deemed to be bona " fide let at a rent which includes payments in respect of " attendance . . . . unless the amount of rent which is fairly " attributable to the attendance . . . regard being had to the " value of the same to the tenant forms a substantial portion " of the whole rent."

The question which arises in the present appeal is whether or not the sum of 15*l.*—which by the agreement is the sum to be paid by way of additional rent for the services described in cl. 3 of the lease—is the sum which represents the proportion of the total rent fairly attributable to the attendance, regard being had to the value of the same to the tenant, and whether it is a substantial portion of the whole rent. It is common ground, I think, that if the proportion fairly attributable to the attendance, regard being had to the value of the same to the tenant, is only 15*l.*, that would not be a substantial proportion of the total rent of 185*l.* The tenant contends that this sum is the sum fairly attributable to the value of the attendance, and she says that as that is not a substantial proportion of the whole she is entitled to the protection of the Act. The landlords, on the other hand, say that the sum of 15*l.* arranged between them and Mr. Anderson does not represent a proportion fairly attributable to the value of the attendance, regard being had to the value to Mrs. Macartney, who, they say, is the tenant for the purposes of s. 10 of the Act of 1923. They further say that in any event 15*l.* does not represent the contractual value of the services which the landlords undertook to provide under cl. 3.

Denning J. decided this case at a time when *Palser* v. *Grinling* (1) had not reached the House of Lords, but had been decided by this court. Having referred to the judgment of Morton L.J. in that case, Denning J. said this : " In my opinion, however, they also apply in a case such " as the present when it is not an inclusive rent, where the " parties of themselves settled, as they have here, 170*l.*

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(1) [1946] K. B. 631 ; [1948] A. C. 291.

" for the rent and 15*l.* for the services. In a case of this " kind, where the parties themselves have made the severance, " I think that in the ordinary way it is reasonable to assume " that that division and the amounts allocated are a genuine " pre-estimate of the value of the services therein mentioned. I am supported in this view in the present case " by the evidence that was given in relation to the original " letting, but in any view, evidence or no evidence, when such " a difficult matter is put upon the court, when the parties have " themselves done it in their contract and specified a certain " amount, such as here, 15*l.* per annum for service charges, in " my judgment, that should in the ordinary way be taken as a " genuine pre-estimate of the value of the matters concerned, or " the price for them. That is emphasized in the present case " by the analysis which has been put before me." Then, at a later part of his judgment, he goes on: " When you have such " a difficult matter to assess and estimate, when the parties " have in their agreement set it down, it is prima facie to be " taken as correct. In this case I see nothing in all these " calculations to satisfy me that that 15*l.* is not a perfectly " proper figure to put upon the value of the services which are " contractually there provided for that sum " (1).

The first question to be solved in this case is whether or not the " tenant " referred to in s. 10 of the Act of 1923 is Mr. Anderson or the defendant, Mrs. Macartney. With regard to that, I refer to a passage in Lord Simon's speech in *Palser* v. *Grinling* (2), where he said: " Now comes the question of how " to arrive at ' the amount of rent which is fairly attributable " ' to attendance or the use of furniture, regard being had to the " ' value of the same to the tenant.' It is convenient first to " observe that the ' amount of rent ' is equivalent to ' the " ' portion of the whole rent.' ' Of the same ' refers to the " attendance or the use of furniture or to both together when " both are provided. A question of some difficulty arises as " to the meaning of the ' tenant '—does the expression refer " to the particular individual whose lease is in question, or does " it refer to the average or normal tenant of that class of " property? I think the phrase refers to the actual tenant " whose lease is under examination. It is the analysis of the " particular transaction to which he is a party that is the " subject matter of the inquiry. It is the value to him (and " included in that value is the fact that he may assign or sub-

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(1) [1947] K. B. 594. (2) [1948] A. C. 291, 294.

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" let) which must be taken into account. But in taking this " view, it is of the utmost importance to observe that the " section directs that ' regard shall be had ' to the value to the " tenant, and not that the value to such tenant is to govern " the calculation absolutely." Now it is quite clear that *Palser* v. *Grinling* (1) was a case which did not concern an assignment—the court there was dealing with the original tenant but none the less an argument had been advanced in *Property Holding Co., Ld.* v. *Mischeff* (1) (which was decided at the same time) which did involve a consideration as to the position if there had been an assignment, and that is dealt with by Lord Simon at p. 309. In that case the original lease was dated 1937, and in 1942 there had been what was held to be a sub-lease which, it had been contended, amounted to an assignment. Lord Simon said this : " If the respondent was right " in this, the year as at which the furniture should be valued " would be 1937 and not 1942. But there is no substance in " this contention." He was there, at any rate, indicating the view that the material date was the date of the original lease and not the date at which the assignment had taken place, if there had been an assignment.

In my view, the " tenant " referred to in s. 10 of the act of 1923 means the original tenant, the tenant who had been a party to the formation of the contract made with the landlord. Of course, quite often he is also the tenant in occupation of the premises at the date of the expiration of the notice to quit, and when the case comes before the court. I think that meaning is implicit in Lord Simon's speech, and I think, furthermore, that it is the natural meaning to be given to the word. The other construction contended for by Mr. Diplock would have the curious result that, although the total rent for premises might remain constant, and although the amount apportioned between the parties and attributed to the attendance might remain constant, none the less the premises would go in and out of the Rent Restriction Acts according to the requirements or needs of the particular assignee at a particular time. That would, I think, be a very undesirable and confusing consequence and unless I am driven to that view I should be disposed to decide that the word " tenant " means the original contractual tenant.

That passage from the speech of Lord Simon also, in my view, makes it clear that in arriving at the proportion fairly attributable to attendance you must have regard to the requirements of the particular individual whose lease is in question. That rules out regard being had to the average tenant or the normal tenant in Artillery Mansions, or anywhere else. I think it shows that this matter cannot be decided objectively by assessing the value of the covenant standing by itself and assuming that every tenant will require the landlord to implement it to the full. I think that the needs and requirements of a particular tenant, namely, the original contractual tenant—in this case Mr. Anderson—have to be taken into consideration.

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(1) [1948] A. C. 291, 294.

That view, I think, is the view indicated by Morton L.J. in his judgment in this court in *Palser* v. *Grinling* (1). He says this, and it is necessary to read this portion of his judgment at some length: "I think the judge must next consider whether "there are any special circumstances providing grounds for "attributing to the tenant of the particular flat in question "either more or less than his proportion of the cost of providing "attendance, arrived at in the above manner. For instance, "suppose that part of the attendance provided is the carrying "of coals to the flats by a man employed by the landlord: is it "right that a portion of the cost of this labour should be "attributed to a tenant who chooses to install electric fires in "all his rooms? This is a matter which was much argued "before us. My own view is that if the carrying of coals is a "service which the landlord undertakes to provide for a tenant, "then prima facie that service is of the same value to that "tenant as it would be to any other tenant, and the burden is "upon the tenant to satisfy the court that less than his "arithmetical proportion of the cost should be attributed to "him. For instance, the tenant might prove that when the "terms of the lease were being arranged, he told the landlord "that he did not require this service, and that the landlord "could make the appropriate alteration in the lease. If, in "these circumstances the landlord insisted on keeping to his "common form of lease, which included this provision, the "judge might well think that the amount of rent which was "fairly attributable to that particular attendance was little or "nothing. In *Engvall*'s case (2) the Master of the Rolls said: "'With regard to No. 19—the provision of personal services "'of a caretaker for the purpose of carrying up wood, coals,

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(1) [1946] K. B. 631, 638.

(2) [1945] K. B. 205.

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" ' and so forth—the fact is that the tenant used electric fires " ' and did not make use of those services, and had no need for " ' them. The judge, accordingly, held (and I think he was " ' fairly entitled to hold) that no value to the tenant must be " ' attributed to that particular undertaking by the land- " ' lord '." Then Morton L.J. went on: " I am sure Lord " Greene did not intend to lay down any general rule that, if a " tenant in fact makes no use of a particular 'attendance' " which the landlord has contracted to give, no part of the rent " must be attributed to that attendance. I think the important " point is—what did the parties contemplate at the time when " the lease was granted ? " As I read his judgment, that is a clear expression of opinion by Morton L.J. that the real crux of the matter is what was contemplated by the parties at the time when the lease was granted. If the House of Lords had thought that was an erroneous view, I think Lord Simon, in his speech, would have said so in terms. It is argued by Mr. Diplock that when carefully examined the reasoning of Lord Simon in his speech is inconsistent with that view expressed by Morton L.J. I do not think it is.

I have already quoted an extract from Lord Simon's speech at p. 314, so I need not repeat it, but it must be borne in mind and considered closely in connexion with the passage at p. 319, to which I am about to refer, and which is most relied upon by Mr. Diplock. Lord Simon there said this: " The Lord Chief " Justice recognized that the services of the porter were not " solely for the tenants' advantage, but he put this on the " limited ground that the removal of refuse is also to the " advantage of the landlord. A broader view is fully justified, " namely, that the greater part of the services of the porter " were services rendered to the landlord which did not involve " any attendance upon the tenants at all. On the other hand, " the Lord Chief Justice, following *Engvall* v. *Ideal Flats,* " *Ld.* (1), held that inasmuch as the respondent did not require " the services of the porter for carrying up coals, because she " was not using coal fires, the portion of the whole rent which " was fairly attributable to the porter's attendance for this " purpose would be reduced. This does not seem to be the " case, for the tenant who has contracted to pay rent for " attendance which the landlord covenants to supply cannot " reduce the proportion of the rent fairly attributable to such

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(1) [1945] K. B. 205.

"attendance by saying that, though he is entitled to have it, "he does not want it. The result in *Palser's* case is that "the attendance provided by the appellant and paid for in the "total rent was not such as to make the figure which may be "fairly attributable to it a substantial portion of the whole "rent." Mr. Diplock argues that Lord Simon is there saying, in effect, that all you have to look at is what is the attendance to which the tenant is contractually entitled. He says that that conflicts with Morton L.J.'s expression of opinion, and he furthermore says that Morton L.J.'s opinion must be considered in relation to the particular circumstances with which he was dealing, and that he was only dealing with a case (which he had given as an example) where the tenant had not, in fact, availed himself of the attendance which the landlord had contracted to supply. I think that Lord Simon is confining himself entirely to the case where the tenant has, in fact, not availed himself of the services, and I think he is accepting Morton L.J.'s view with regard to that. Morton L.J. had clearly indicated that he did not think that Lord Greene ever intended to suggest that the mere circumstance of non-user would affect the matter. I cannot find anything in that passage, or in the rest of Lord Simon's speech, to indicate that he is dissenting from the proposition of Morton L.J., that the important point is what did the parties contemplate at the time the lease was granted. Incidentally, if that is right it further strengthens my view that Mr. Anderson and not Mrs. Macartney is the tenant envisaged, because no question arises as to anything ever being in the contemplation of Mrs. Macartney. The only parties who could contemplate anything on the subject were the plaintiffs and Mr. Anderson.

If that is the right view, how does the matter stand? This particular covenant in cl. 3 of the lease is not like a covenant by the landlord to repair; it is not even like a covenant by a landlord to supply certain specified articles of furniture, such as a piano or the articles of furniture which may appear in the schedule to a lease. Covenants of that nature are absolute; the repairs have got to be carried out and the furniture has got to be supplied if it is part of the contract. But this is a provision which entitled the tenant, at his option, to call for certain services to be rendered to him by way of attendance. A substantial proportion of the services envisaged in cl. 3 are, by their nature, such that they depend upon the requirements of a particular tenant at a particular time. "The service "to be provided by the company shall include keeping the "rooms and furniture clean, sweeping chimneys, cleaning "windows, lighting fires, valeting and general attendance." If the tenant is not there he may not require his fire to be lighted, or his bed to be made, or any valeting: it depends upon the extent to which he occupies the flat and how often he rings the bell, if there is one, to summon an attendant to render him some of these services. I think, in considering a clause of this kind, the parties when entering into an agreement like this may very well, and very properly, take into consideration the probable extent to which the tenant is going to call upon the landlord to implement his obligation under such a clause. Similarly, it may become very relevant for the landlord to consider the extent to which he is going to be called upon to implement this obligation. In this case there was evidence (and there is no dispute about this) that the sum of 15*l*. arrived at between the plaintiffs and Mr. Anderson was on the basis that Mr. Anderson (who was, I think, a journalist concerned particularly with agricultural matters) was not likely to avail himself to any considerable extent of the services which the landlords undertook by cl. 3 to provide if required, and, therefore, the landlords and Mr. Anderson agreed to allocate to those services, in the particular circumstances of this case, a sum which, according to the evidence of the landlord, was one considerably below the sum which would properly be attributable to services supplied to a tenant who required 100 per cent. performance of the obligations under that covenant.

That being so, I find myself in agreement with Denning J. (as he then was) in saying that I see no reason to interfere with the bona fide pre-estimate made by the parties of the proportion of the rent fairly attributable to the value to the tenant of this attendance.

I desire to add that I have not lost sight of the fact that Lord Simon stated that one of the elements to be taken into consideration in apportioning the amount of the rent attributable to the attendance is the fact that he may assign or sub-let. That, in some cases, and in the case of a lease of long duration, may be a valuable asset and it may increase the sum attributable to the attendance. But in this particular case the lease was of very short duration; it was only for one year and thereafter at a quarter's notice. I have no doubt that this matter did not enter into the actual calculations of Mr. Anderson or the plaintiffs, any more than it had occurred to any of the counsel or judges until *Palser* v. *Grinling* (1) reached the House of Lords. In this particular case, having regard to the short duration of the tenancy and the fact that there was nothing to indicate that Mr. Anderson at that time contemplated that he would be likely to wish to avail himself of the right to assign, I think that that element is not sufficient to compel us to interfere with the pre-estimate of 15*l*. at which the parties arrived.

For these reasons I think that this appeal fails.

ASQUITH L.J. I agree. It is true that what has to be valued here is the contractual right to attendance and not the quantum of attendance actually utilized by the tenant; but in valuing the contractual right the Act of 1923, by s. 10, provides that regard must be had to its value to the tenant. The House of Lords, in *Palser* v. *Grinling* (2), has held that the "tenant" in this context means not a hypothetical or average tenant but, to use the words of Lord Simon, "the actual tenant "whose lease is under examination"—who, for the reasons given by my Lord, and which I will not repeat, I agree is Mr. Anderson and not Mrs. Macartney. This, it seems to me, can only be done by taking into account the special needs and requirements of that individual tenant. Those are the factors which measure the value of the contractual right to the particular tenant as distinct from its market value to persons generally. Notwithstanding Mr. Diplock's very persuasive argument, I do not think, on reflection, that these conclusions are inconsistent with what was said by Lord Simon in *Palser* v. *Grinling* (2) or that in the material passage Lord Simon is disapproving of what Morton L.J. (as he then was) said (3). Where the special needs of the tenant are disclosed before the contract to the landlord and, therefore, before a value is set in the contract on the right to their satisfaction, there is a very strong presumption that the contractual value is the true value of the right to the tenant. Lord Simon, in the passage so often cited from p. 319, is simply saying, to my mind, that the value of the contractual right to the tenant crystallizes at the time of the contract and cannot be changed afterwards according as the tenant, in the event, makes use of his contractual rights to an extent greater or less than was originally

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(1) [1948] A. C. 291.
(2) Ibid. 319.
(3) [1946] K. B. at pp. 638–9.

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anticipated. For these reasons, in addition to those given by my Lord, I agree that the appeal should be dismissed.

SINGLETON L.J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Wainwright & Pollock, O'Bryen-Taylor & Co.*

Solicitors for defendant: *William Foux & Co.*

A. W. G.

C. A.

1948
June 10, 23.

Tucker, Somervell and Cohen L.JJ.

WILSON & SONS *v.* PIKE.

Sale of goods—Sale by auction—Goods knocked down to bidder—Bidder's name written in sale catalogue by auctioneer conducting sale on behalf of firm—Claim by firm from bidder for price of goods—Sufficiency of note or memorandum—Sale of Goods Act, 1893 (56 & 57 *Vict., c.* 71), *s.* 4.

An auction sale was conducted by T. a licensed auctioneer in the employ of the plaintiffs, a firm of auctioneers. After a lot had been knocked down to the defendant, his agent supplied his name to T., who thereupon wrote the defendant's name in the sale catalogue opposite the lot. The plaintiffs accounted to the seller for the price (20*l.*) at which the lot was knocked down, but the defendant refused to pay it and when sued by the plaintiffs for its recovery contended that the note or memorandum of the contract on which they were suing was, on the principle in *Farebrother* v. *Simmons* (1822) 5 B. & A. 333, insufficient to satisfy s. 4 of the Sale of Goods Act, 1893.

Held, that, assuming the plaintiffs to be suing on the contract of sale between the seller and the defendant, they were entitled to rely on the note or memorandum signed by T., and to recover the sum claimed, because his name was not on the record in the action brought to enforce that contract.

Held, further, that the plaintiffs were so entitled to recover independently of T.'s special authority to sign on behalf of the buyer, because a licensed auctioneer conducting an auction sale—as distinct from an auctioneer's clerk—did not require express authorization so to sign on ascertaining the buyer's name.

Quaere, whether in such a case the right of auctioneers to sue the buyer for the price of a lot knocked down to him arises, not out of the contract of sale between buyer and seller, but out of the auctioneers' special property in the goods and also their contract with the buyer whereby the latter undertakes to pay the amount of his bid into their hands.

Farebrother v. *Simmons* 5 B. & A. 333 explained and distinguished.

APPEAL from Birkenhead county court.

The plaintiffs, J. J. and G. D. Wilson, carried on business as auctioneers under the style of Wilson & Sons. An auction sale, in which neither of them took part, was conducted on their behalf on December 19, 1946, by one Thackeray, a licensed auctioneer in their employ. In the course of the sale a mahogany sideboard was knocked down to the defendant at the price of 20*l.* in consequence of a bid made on his behalf by a Mrs. McCullick, another employee of the auctioneers. She had the buyer's authority to bid on his behalf. As a result of the bid the auctioneer, Thackeray, was supplied by Mrs. McCullick with the buyer's name as purchaser, and he entered that name in the catalogue against the item in question. The auctioneers accounted to the seller for the 20*l.* The buyer refused to pay them that sum, alleging that Mrs. McCullick had exceeded her authority in relation to the bid. The auctioneers accordingly brought this action. It was admitted by the buyer that there was in existence a sufficient note or memorandum to satisfy s. 4 of the Sale of Goods Act, 1893, in an action between seller and buyer, but it was contended on his behalf, on the authority of *Farebrother* v. *Simmons* (1), that the plaintiffs, in an action brought by them as auctioneers, could not rely on a note or memorandum made by them as agents for the defendant buyer for the purpose of enforcing a contract to which they were themselves parties. The county court judge distinguished that case, held that in the special circumstances the auctioneer Thackeray was specially authorized to sign on the buyer's behalf, and gave judgment for the auctioneers. The buyer appealed.

Bingham for the defendant buyer. The intervention of the licensed auctioneer, Thackeray, is the only point of distinction between this case and *Farebrother* v. *Simmons* (1) where it was held that plaintiffs cannot sue a defendant on a memorandum of contract signed by them on his behalf. The county court judge held that Thackeray signed the memorandum as a third party and on behalf of the buyer. The question, however, is whether he can be regarded as a third party. The auctioneers here can sue as having a special property in the sideboard which they derive from their status as auctioneers and from the contract between themselves, as auctioneers, and the buyer. That is a different and distinct contract from the contract of

(1) (1822) 5 B. & A. 333.

sale between seller and buyer: see per Salter J. in *Benton* v. *Campbell, Parker & Co., Ld.* (1). The contract requiring a note or memorandum here is that between the defendant buyer and the plaintiff auctioneers whose claim is for goods sold and delivered. The auctioneers are passing their special property in the goods to the buyer. [Judgment of Salter J. (2) referred to.] Thackeray's signature creates a note sufficient to bind buyer and seller as between themselves. The two contracts here are distinct, but they are contemporaneous, arise out of the same facts, produce identical effects vis à vis the parties, and are both, it is submitted, contracts for the sale of goods requiring a note or memorandum to satisfy the Sale of Goods Act. In *Benton* v. *Campbell, Parker & Co., Ld.* (1) the two contracts were, it is submitted, treated separately only for the purpose of distinguishing between the warranties respectively attaching to them. A sufficient memorandum is required in order to charge the buyer vis à vis either the seller or the auctioneer. The auctioneer, under his contract, seeks to enforce the same rights, arising at the same time and on the same facts, as would the seller. It would accordingly be inconsistent with *Farebrother* v. *Simmons* (3) to allow the plaintiff auctioneers to rely on their own signature to charge the buyer, and Thackeray's signature must be taken as equivalent to their own. [*Williams* v. *Millington* (4) referred to.] To hold that Thackeray counts as a third party here would be to give a partnership an advantage over a company, which can only sign a contract through its servant. Thackeray cannot be regarded as a third party in this transaction, for the special property in the goods which gives the plaintiff auctioneers the right to sue the purchaser arises out of the contract between the auctioneer and the buyer. Whatever the capacity of the auctioneer Thackeray in the main contract between seller and buyer, his capacity in the subsequent contract between the plaintiff auctioneers and the buyer is that of the plaintiff auctioneers' servant or agent or representative, and in that capacity he cannot be a third party to the contract now sued on.

[TUCKER L.J. Do you say that the capacity in which Thackeray signed the memorandum is the same as that in which he conducted the auction sale?]

If the plaintiff auctioneers had been on the rostrum, they would certainly have been caught by *Farebrother* v. *Simmons* (3).

(1) [1925] 2 K. B. 410, 415.
(2) Ibid. 416, 420.
(3) 5 B. & A. 333.
(4) (1788) 1 H. Bl. 81.

Can it make any difference that Thackeray, their employee, was on the rostrum? [*Bird* v. *Boulter* (1) referred to.]

[SOMERVELL L.J. In view of *Bird* v. *Boulter* (1), is it not sufficient that the note or memorandum should have been signed by a person (Thackeray) not on the record in this action?]

Bird v. *Boulter* (1) would seem to lay down a principle which, in view of pronouncements in *Bell* v. *Balls* (2), can no longer be supported.

[COHEN L.J. Is it right to consider the position of a clerk, when the person here concerned (Thackeray) was the person wielding the hammer, that is, conducting the sale?]

It is precisely because of that position of Thackeray that he is a third party as between the seller and the buyer but that, when it is the auctioneers who sue, there is no third party: the auctioneer Thackeray is for present purposes the same person as the plaintiff auctioneers. If the whole transaction is regarded, a third party can be isolated, but in this action, which concerns only one aspect of the whole transaction, there are only two parties, the auctioneers and the buyer, with the former of whom Thackeray must be identified.

[TUCKER L.J. You say that a third party must be some person other than the auctioneer who has been expressly asked, on behalf of the buyer, to sign?] Yes.

Vaines for the plaintiff auctioneers. The point is a short one. The effect of *Farebrother* v. *Simmons* (3) is limited. It is only necessary to look at the name of the party on the record. If the note or memorandum is signed, with due authority, by someone other than a person whose name is on the record, then, all other things being equal, it will be a good memorandum. It is not disputed that the memorandum here is in itself a proper memorandum as between buyer and seller, and the county court judge has found as a fact that Thackeray had authority to write the buyer's name down in the catalogue of the sale.

[TUCKER L.J. The basis of the decisions seems to be that the man on the rostrum cannot be regarded in any circumstances as having authority to sign for the buyer. Can it make any difference that the person who sues on the contract is the employer of the man on the rostrum?]

It is a departure from the principle of irrevocability of authority as between buyer and auctioneer that the auctioneer should be deprived of his remedy against the purchaser because he, the auctioneer, has signed the memorandum of the contract. Thackeray had authority to sign not only as an auctioneer but also, as the county court judge found, on behalf of the buyer. Moreover, Thackeray's name does not appear on the record in this action, and on the strict construction which it is necessary to put on the decision in *Farebrother* v. *Simmons* (1), he is, it is submitted, a third party in the matter. The fact that he is an employee of the plaintiff auctioneers is immaterial, for in *Bird* v. *Boulter* (2) it was a clerk whose signature of the memorandum on behalf of the buyer was held to be valid.

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(1) (1833) 4 B. & Ad. 443, 446, 447.

(2) [1897] 1 Ch. 663, 668, 671.

(3) 5 B. & A. 333.

The plaintiff auctioneers' case therefore rests, to express it briefly, on the two submissions: (1.) that *Farebrother* v. *Simmons* (1) has no application where an auctioneer is suing not on the main contract of sale but on the subsidiary contract between himself and the buyer; and (2.) that Thackeray, who signed the memorandum on behalf of the buyer, was for all material purposes a third party.

Bingham replied.

Cur. adv. vult.

June 23. TUCKER L.J. read the judgment of the court, and, after stating the facts, continued: The headnote to *Farebrother* v. *Simmons* (1) reads, "The agent contemplated by s. 17 of the "Statute of Frauds, who is to bind a defendant by his signature, "must be a third person, and not the other contracting party; "and therefore, where an auctioneer wrote down the "defendant's name by his authority opposite to the lot "purchased: Held, that in an action brought in the name of "the auctioneer, the entry in such book was not sufficient to "take the case out of the statute."

The material passage in the judgment of Abbott C.J. is as follows (3): "The most favourable way for the plaintiff is to "treat the question as a case of goods sold and delivered; "and then, the goods being above the price of 10*l*., the case will "fall within s. 17 of the Statute of Frauds, which requires some "note or memorandum in writing of the bargain, to be made "and signed by the parties to be charged by it, or their agents, "thereunto lawfully authorized. Now, the question is, whether "the writing down the defendant's name by the plaintiff, "with the authority of the defendant, be in law a signing by

(1) 5 B. & A. 333.
(2) 4 B. & Ad. 443, 446, 447.
(3) 5 B. & A. 334.

"the defendant's agent. In general, an auctioneer may be "considered as the agent and witness of both parties. But the "difficulty arises, in this case, from the auctioneer suing as one "of the contracting parties. The case of *Wright* v. *Dannah* (1) "seems to me to be in point, and fortifies the conclusion at "which I have arrived, namely, that the agent contemplated "by the legislature, who is to bind a defendant by his signature, "must be some third person, and not the other contracting "party upon the record."

The county court judge, in his notes of judgment, discussed the buyer's contention in these words: "The [buyer] put "forward a further point in regard to" the lot in question, "namely, that no note or memoranda had been signed by the "[buyer] which would satisfy the requirements of the Sale of "Goods Act. I found the following facts: 1. That "Mrs. McCullick was the person who actually made the bid "on behalf of the [buyer] and that she was duly authorized "by him to bid. 2. That Mrs. McCullick gave the [buyer's] "name to the auctioneer when asked by him for the name of "the buyer. 3. That Thackeray was the person actually "conducting the auction. 4. That the name of the buyer "was entered in the catalogue by Thackeray. I held that an "auctioneer's clerk has prima facie no authority to sign a "note or memorandum on behalf of the buyer: *Bell* v. "*Balls* (2), but that there were special circumstances from "which I could and ought to infer that the auctioneer was "specially authorized to sign a memorandum. These circum- "stances were the request by the auctioneer to be supplied "with the name of the buyer, and the supplying of the name "of the buyer by his agent Mrs. McCullick. It was contended "by Mr. Bingham in reliance on the case of *Farebrother* v. "*Simmons* (3), that, in an action brought in the name of the "auctioneer, the entry in the catalogue was not sufficient to "take the case out of the statute. I differentiated the case "before me from that case on the ground that in the case "before me the memorandum was not signed by the plaintiff "to the action but by a third party, namely, the auctioneer "Thackeray. I therefore held that the [auctioneers] were "entitled to recover the sum of 20*l*."

The case was argued in the court below and on appeal on the assumption that in an action of this nature the auctioneer is

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(1) (1809) 2 Camp. 203.

(2) [1897] 1 Ch. 663.

(3) 5 B. & A. 333.

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suing on the contract of sale, and that, accordingly, the absence of a sufficient note or memorandum to satisfy s. 4 of the Sale of Goods Act will afford a defence to the purchaser. There can be no doubt that the auctioneer, for the purpose of enforcing his right to receive the purchase price, can sue in his own name as for goods sold and delivered or bargained and sold, and this is so even where he has sold for a disclosed principal: see *Williams* v. *Millington* (1). None the less, we desire to reserve the question whether the true position is not as stated by Salter J. in *Benton* v. *Campbell, Parker & Co., Ld.* (2), where after a review of the authorities he expresses the opinion that the auctioneer does not sue for the price by virtue of the contract of sale but by virtue of his special property and his lien, and also, in most cases, by virtue of his contract with the buyer that the price shall be paid into his hands.

We will, however, assume for the purposes of this judgment that the auctioneers must be taken as suing on the contract of sale made between the seller and the buyer. On this basis the parties to the contract must be the plaintiff auctioneers, J. J. Wilson and G. D. Wilson, carrying on business as Wilson & Sons, of the one part, and the defendant buyer of the other. This contract was made by Thackeray, as agent for the auctioneers, offering the lot for sale by auction and knocking it down to the bid of 20*l.* offered by Mrs, McCullick on behalf of the buyer. After the fall of the hammer, Thackeray, pursuant to his authority so to do on behalf of the buyer, signs a memorandum sufficient to satisfy the requirements of s. 4 as between seller and buyer. Thackeray is not suing on a contract made by him as principal. He is not a party on the record. If he were, he would be met with the defence that one party to a contract cannot be the agent of the other to make and sign a memorandum on his behalf: see *Farebrother* v. *Simmons* (3) and *Sharman* v. *Brandt* (4). But one party to a contract can confer authority on the agent of the other party so to do: see *Bird* v. *Boulter* (5), *Murphy* v. *Boese* (6); and it frequently happens that one and the same person is authorized by each party to act as his agent for this purpose. Such is often the case where sales are made by brokers, and a sale by an auctioneer on behalf of the vendor followed by his signature on behalf of the purchaser is only another instance.

(1) 1 H. Bl. 81.

(2) [1925] 2 K. B. 410.

(3) 5 B. & A. 333.

(4) (1871) L. R. 6 Q. B. 720.

(5) 4 B. & Ad. 443.

(6) (1875) L. R. 10 Ex. 126.

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In this case Wilson & Sons, who are the plaintiffs on the record, authorize their agent, Thackeray, to sell by auction, and the defendant Pike, the buyer, authorizes Thackeray to sign on his behalf. It being conceded that the memorandum is otherwise sufficient, we can see no reason why Wilson & Sons cannot sue on this contract and rely on the memorandum signed by Thackeray as agent for the buyer: it seems to us that, on a true analysis of the facts of this case, the decision in *Farebrother* v. *Simmons* (1), limited as it is to the case of a contracting party who is also a party on the record, does not preclude them from recovering. We reach this conclusion irrespective of the judge's finding that Thackeray was specially authorized to sign as a result of his request to be supplied with the name of the buyer and the supplying of the name of the buyer by his agent, Mrs. McCullick. Thackeray, being a licensed auctioneer conducting a sale by auction—as distinct from an auctioneer's clerk—did not require any express authorization to sign on ascertaining the identity of the buyer.

For these reasons, and assuming that the auctioneers must be taken as suing on the contract of sale, we are of opinion that this appeal fails and should be dismissed.

Appeal dismissed.

Solicitors for the defendant buyer: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead.*

Solicitors for the plaintiff auctioneers: *Pritchard, Englefield, & Co., for Latin & Masheder, Liverpool.*

(1) 5 B. & A. 333.

R. C. C.

REX *v.* SECRETARY OF THE BOARD OF CONTROL AND ANOTHER.

In re DAWSON. *Ex parte* ABDUL KAYUM.

1948
Oct. 19.

Lord Goddard C.J., Humphreys and Byrne JJ.

Mental deficiency—Powers of Board of Control—Power to make order "in case of any institution"—Order made for all certified institutions—Validity—Habeas corpus—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *s.* 11, *sub-s.* 1, *proviso.*

Section 11, sub-s. 1, of the Mental Deficiency Act, 1913, provides that an order made under that Act and sending a defective to an institution or placing him under guardianship should expire at the end of one year from its date: "Provided that in the case of any

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"institution the Board [of Control] may by order direct that orders "that persons be sent thereto . . . ." should expire on the quarter day next after the day on which the order would have expired under that provision. On April 10, 1915, the Board of Control made a general order directing that all orders under which persons were detained in institutions should be extended to the quarter day next after the day on which such order would otherwise have expired.

Held that that general order of April 10, 1915, was valid and that it was unnecessary for the board to make a separate order in regard to each several institution.

APPEAL from Slade J.

By an order dated November 5, 1946, made by the Secretary of State under s. 9 of the Mental Deficiency Act, 1913, Joyce Elizabeth Dawson, who was then detained under an order of the court, was sent to an institution for mental defectives. On January 6, 1948, the order of November 5, 1946, was continued by an order of the Board of Control.

The appellant applied to Slade J. for a writ of habeas corpus on the ground that Dawson was unlawfully detained in an institution. Slade J. held that by a general order of April 10, 1915 (1) made by the Board of Control under s. 11, sub-s. 1, of the Mental Deficiency Act, 1913 (2), the order of November 5, 1946, was effective until December 25, 1947, and that by s. 1, sub-s. 1, of the Mental Deficiency Act of 1938 (3) it was effective

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(1) By a general order of the Board of Control, dated April 10, 1915: "The date of expiration "of the order or authority for "detention of all persons detained "in certified institutions and certified houses shall be extended to "the quarter day next after the "day on which the said order or "authority for detention would "have otherwise have expired."

(2) Mental Deficiency Act, 1913, s. 11, sub-s. 1: "An order "made under this Act that a "defective be sent to an institution "or placed under guardianship "shall expire at the end of one "year from its date, unless continued in manner hereinafter "provided: Provided that in the "case of any institution the Board "[of Control] may by order direct "that orders that persons be sent "thereto shall, unless continued "as hereinafter provided, expire "on the quarter day next after the "day on which the orders would "have expired under the above "provision." Sub-section 2 provides for the continuation from time to time by the Board of Control of orders made (inter alia) under s. 9.

(3) Mental Deficiency Act, 1938, s. 1, sub-s. 1, provides that a detention order can be continued under s. 11, sub-s. 2, of the Act of 1913 if the order continuing it is made "within "one month after the date on "which, but for the provisions of "this subsection, the detention "would be limited to expire ". . . ."

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until January 25, 1948, and that Dawson was accordingly lawfully detained. He therefore refused the application.

The appellant appealed.

H. Heathcote-Williams and *H. I. Spence* for the appellant. No valid order has been in force since December 5, 1947, under which the respondents are entitled to detain Dawson. The order of November 5, 1946, would have expired on November 4, 1947, by s. 11, sub-s. 1, of the Mental Deficiency Act, 1913, but it was extended until December 4, 1947, by s. 1, sub-s. 1, of the Mental Deficiency Act, 1938. The general order of April 10, 1915, did not operate to extend that time (i.) because, if it was valid, it could only operate in respect of orders in force on April 10, 1915, and (ii.) because it was in fact invalid, since the Act of 1913 imposed a discretion on the Board of Control and a general order such as that of April, 1915, was a negation of the exercise of a discretion. As to (i.) s. 11, sub-s. 1, proviso enables the Board to continue an order in existence at the date when the Act of 1913 came into force (April 1, 1914), until the quarter day next after the day on which such order would otherwise have expired. It does not empower them to substitute in advance, in respect of orders not yet made, a longer period for a period of one year. Furthermore, the general order of April 10, 1915, only relates, on its face, to persons detained on April 10, 1915. As to (ii.) that proviso states that "in the "case of any institution the Board may by order direct . . . ." They must direct their minds to the case of each specific institution, i.e., the statute imposed a discretion on them. Their decision, in making the general order, must have been completely arbitrary because that order (if contention (i.) is wrong) related to institutions which and persons who were not then in existence. Where a statute gives to an authority a discretion to make an order it must exercise that discretion in each specific case, and a general order covering all cases is a nullity, *The Queen* v. *Sylvester* (1) approved by Lord Halsbury L.C. in *Sharp* v. *Wakefield* (2); *Rex* v. *Commissioner of Police. Ex parte Randall* (3); *The King* v. *London County Council. Ex parte Corrie* (4). The order of November 5, 1946, therefore expired on December 4, 1947, and the order of January 6, 1948, which purported to continue it was ineffective, since the order of November 5, 1946, could not be continued under sub-s. 2 of s. 11 after it had expired. *The King* v. *Board of Control*. *Ex parte Winterflood* (1).

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(1) (1862) 31 L. J. (M. C.) 93.
(2) [1891] A. C. 173, 180.
(3) (1911) 27 T. L. R. 505.
(4) [1918] 1 K. B. 68.

Sir Frank Soskice S.-G., H. L. Parker and *J. H. L. Royle* for the respondents were not called upon.

Lord Goddard C.J. I think Slade J. was right, and that the point is a clear one. The proviso to s. 11, sub-s. 1, of the Mental Deficiency Act, 1913, seems to me to be framed with a view to distinguishing the case of persons detained in institutions from the case of persons placed under guardianship. The proviso has no application to persons placed under guardianship, and orders placing persons under guardianship will expire (unless continued as provided by s. 11, sub-s. 2) at the end of one year. I think that Parliament considered that it should be possible for the Board of Control, for the purpose of convenience of administration, by order to extend orders under which a person was detained in an institution so that all those orders would expire on one of the four quarter days. It was merely a matter of administrative convenience so that instead of orders expiring on any day of the year they would expire only on one of the four quarter days. If the general order of April 10, 1915, is valid, the order of November 5, 1946, for the detention of Dawson was extended by the general order to Christmas Day, 1947, and, by virtue of s. 1, sub-s. 1, of the Mental Deficiency Act, 1938, there was one month, that is to say, until January 25, 1948, for the continuation of that order. If the order of 1915 is valid, it must be conceded that Dawson is in lawful custody.

It was argued by Mr. Heathcote-Williams that the order of 1915 was not a valid order, because it applied to all institutions and because the board was bound to consider each one separately and to exercise its discretion in respect of each one separately. The authorities which have been cited to us are cases in which a person has applied for licence to carry on a particular business, and it has been decided that he was entitled to have his individual case considered, and that if magistrates or some other authority, laid down a general rule to the effect : " We are not going to consider anybody who does " not fulfil certain conditions," that was a bad exercise of their discretion. Those authorities have, in my judgment, no application to a case of the present kind. As I have already said the proviso to s. 11, sub-s. 1, of the Act of 1913, seems to

(1) [1938] 2 K. B. 366.

me to be a proviso for the convenience of administration. If the Board of Control can make an order, as they are given power to do, in respect of any institution, it seems to me to follow that they can make an order in respect of every institution. If, then, they can make an order in respect of every institution, it would surely be a work of supererogation for them to issue a separate order in respect of each institution, naming it. What they have done, and what in my opinion they were entitled to do, was to say: "We are going to apply "to all certified institutions this proviso which Parliament has "allowed us to apply." As I have already said, the proviso applies only to orders under which persons are detained in institutions and not to orders of guardianship. Orders of guardianship expire at the end of one year. They cannot be extended to a quarter day, and, of course, there would be no reason why they should be, because the same considerations of administrative convenience do not apply. I think that the Board of Control have power to make an order under the proviso to s. 11, sub-s. 1, which applies to all institutions, and that they have power to make it in one document and that it was not necessary for them to make it in several documents.

The other point which Mr. Heathcote-Williams raised was that that proviso only applied to persons who were detained in institutions at the date when the Act of 1913 came into force, i.e., on April 1, 1914. In my opinion that is not the true construction of the proviso. It would indeed be an odd proviso if that were the true construction, because it would be obvious that the effect of it would very soon wear off. It is in respect of institutions, not individuals, that an order is to be made under the proviso. If the Board say: "All institutions are "to be affected by this order," all institutions are affected by such an order and the persons who are in those institutions are subject to it.

In my opinion there is nothing in either of these two points. The position is clear, and Slade J. was right in refusing the application.

HUMPHREYS J. I agree and have nothing to add.

BYRNE J. I agree.

Appeal dismissed.

Solicitors for appellant: *Cassavetti, Coustas & Co.*

Solicitor for respondents: *The Solicitor for the Ministry of Health.*

R. P. C.

1948
Oct. 13, 14,
19.

Lewis J.

REED AND OTHERS v. DEAN.

Contract—Hire of specific chattel—Warranty of fitness—Charter of launch for holiday—Fire on board—Cause unexplained—Fire fighting equipment defective—Liability.

Where a chattel is hired there is an implied warranty by the letter that it shall be as fit for the purpose for which it is hired as reasonable care and skill can make it.

The plaintiffs hired a motor launch by name from the defendant for a holiday on the River Thames. The launch caught fire for an unexplained cause soon after the plaintiffs had started off on their holiday. They attempted to extinguish the fire, but they were unable to do so, the fire-fighting equipment with which the launch was equipped being out of order. They had to abandon the launch. They suffered personal injuries and lost their belongings on board the launch.

Held (1.) that, although the contract related to a specified launch, there was an implied undertaking by the defendant that that launch was as fit for the purpose for which it was hired as reasonable care and skill could make it.

Robertson v. *Amazon Tug & Lighterage Co.* (1881) 7 Q. B. D. 598 distinguished.

(2.) that, as the launch had caught fire for an unexplained cause there was a presumption that it was not fit for its purpose.

(3.) that the defendant's failure to provide proper fire-fighting equipment was a breach of the implied warranty of fitness.

In April, 1946, the plaintiffs, a husband, his wife and a friend, decided to take a holiday together in June, 1946, by hiring a motor launch on the River Thames. The husband and wife were to pay two-thirds and the friend one-third of the expenses of the holiday. After some preliminary correspondence the defendant sent the wife a leaflet setting out particulars of the motor launch "Golden Age" and the charges for its hire. In it was a statement "For terms of hire see general catalogue" but that catalogue was never sent to the plaintiffs. With the leaflet was sent a form which the wife filled in, signed and returned on April 24. It was headed "Order form for charter "of craft" and stated "Please reserve for me the 'Golden "'Age' at 14*l*. 5*s*. per week for three persons period June 22 "to June 29." No other relevant terms appeared in the correspondence, the leaflet or the order form. The wife received no reply to the order form and telegraphed the defendant therefore on April 28 to inquire whether the booking was fixed. He sent her a telegram by reply saying "Booking O.K."

The plaintiffs arrived at Henley, where the launch was moored, on the afternoon of June 22 and there they were met by one J. Gehr, the defendant's representative. They paid him the balance of the hire then due. Gehr took the plaintiffs out for a trial trip. He showed them a wooden box on board the launch saying: "That ought to be filled with sand." The plaintiffs had tea and set sail at about 7 p.m. and the husband refilled the petrol tank. At about 9 p.m. when they were near Sunning they discovered that a liquid in the bilge by the engine was on fire. The sandbox was still empty and a chemical fire extinguisher with which the launch was also equipped was also found to be empty. After unsuccessfully attempting to extinguish the fire the plaintiffs abandoned the launch and succeeded in reaching the shore. Their belongings on board the launch were lost and they suffered certain personal injuries. The husband admitted to a fireman after the accident that he might have spilt some petrol when he refilled the tank.

The plaintiffs claimed damages from the defendant for breach of an implied term of the contract that the launch was as fit for the purpose for which it was supplied as reasonable care and skill could make it. Alternatively they claimed damages for negligence.

A. E. Holdsworth for the plaintiffs. Subject to express provisions on the matter every contract of hire contains an implied term that the thing hired is as fit for the purpose for which it is hired as reasonable care and skill can make it. The present contract was a contract of hire, and there were no express provisions as to the letter's liability. The defendant cannot rely on the general catalogue mentioned in the leaflet because that catalogue was never sent to the plaintiffs. That being so a term must be implied that the launch was as fit for the purpose of cruising as reasonable care and skill could make it. From the fact that the launch caught fire it follows that it was unfit; res ipsa loquitur. Furthermore it was unfit because its fire-fighting equipment was out of order. Proper fire-fighting equipment is part of the necessary equipment of a motor launch, and failure to provide such equipment is a breach of the implied warranty of fitness. Alternatively, the defendant is liable in negligence.

Melford Stevenson K.C. and *P. B. Morle K.C.* for the defendant. We concede that the defendant cannot rely on the terms of the general catalogue. As regards the claim in contract

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there is no implied warranty of fitness where a specific vessel or other chattel is hired, *Robertson* v. *Amazon Tug & Lighterage Co.* (1). The launch was chartered by name and no such term can therefore be implied. Nor can the defendant be liable in negligence, since he owed no duty to the plaintiffs to provide them with a launch which was fit for its purpose, *Donoghue* v. *Stevenson* (2), *Earl* v. *Lubbock* (3). In *Hyman* v. *Nye* (4) it was held that a person who let out carriages was bound to provide a carriage as fit for its purpose as care and skill could render it, but in that case the carriages were not let out by name as was the launch in the present case. Even if the defendant was under a duty, in contract or in tort, to provide a launch which was fit for its purpose, the plaintiffs have not shown that their loss or injuries were caused by a breach of that duty. Even if there was a warranty of fitness it only required that the launch should be fit for its contemplated purpose, viz., cruising on the river. It was not contemplated that it would catch fire. Therefore failure to provide fire-fighting equipment was not a breach of the implied warranty. It was owing to the plaintiff's negligence that the sand box was not filled.

A. E. Holdsworth in reply. As regards my claim in contract, *Robertson* v. *Amazon Tug & Lighterage Co.* (1) is not referred to on the chapter on "Bailment" in Halsbury's Laws of England, 2nd ed., vol. 1. It is referred to in vol. 16 of that work at pp. 516 (m) and 519 (q) in the chapter on "Hire "Purchase." In a note at p. 516 (m) it is stated that that case is sometimes cited for the proposition for which it has been cited in the present case, but that when carefully examined it does not support that proposition. Bramwell L.J. dissented in *Robertson's* case (1) because he said (5) that that case was the same as a contract of hiring. Cotton L.J. based his judgment on the premise that the contract was not a contract of hire (6). Only the judgment of Brett L.J. (7) supports the proposition there is no implied contract that a specific thing shall be reasonably fit for the purpose for which it is hired. *Jones* v. *Page* (8) established that the mere fact that hirer had a preliminary inspection of the thing hired did not relieve the letter of the implied warranty of fitness. *Robertson's* case (1) has only been judicially referred to three times, in *The West Cock* (1), in *The Glenmorven* (2) and in *Point Anne Quarries, Ld.* v. *The Ship M. F. Whalen* (3). The contracts in each of those three cases were contracts of towage, and those cases do not, therefore, assist in determining the present question. If *Robertson's* case (4) is an authority for the proposition that a warranty of fitness is not to be implied where a specific chattel is hired it is not binding because the contract in *Robertson's* case (4) was not a contract of hire and it is inconsistent with *Jones* v. *Page* (5) and *Hyman* v. *Nye* (6). As regards the claim in negligence the defendant was under a duty of care to all three of the plaintiffs, *White* v. *Steadman* (7).

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(1) (1881) 7 Q. B. D. 598.
(2) [1932] A. C. 562.
(3) [1905] 1 K. B. 253.
(4) (1881) 6 Q. B. D. 685.
(5) 7 Q. B. D. 598. 603.
(6) Ibid. 609, 610.
(7) Ibid. 606.
(8) (1867) 15 L. T. 619.

Cur. adv. vult.

October 19. LEWIS J. It having been proved that the general catalogue setting out particulars of the "Golden Age" which was mentioned in the leaflet was never sent to the plaintiffs, Mr. Melford Stevenson quite rightly said that he could not rely on any conditions set out in that catalogue. The terms of the hiring therefore were set out in the order form which the plaintiff wife completed, signed and returned on April 24, 1946.

This case is not altogether free from difficulty. Mr. Melford Stevenson argued that there was no such implied term in a case of this kind as is pleaded by the plaintiffs, namely, that the thing hired should be as fit for the purpose for which it was hired as reasonable care and skill could make it, and he relied on *Robertson* v. *Amazon Tug & Lighterage Co.* (4). That is an interesting case, but in my view it does not apply to a contract of hire such as the contract in the present case. It was a decision of three judges, one of whom dissented, but the majority decided that, in the case of a contract such as the one which was being considered in that case, where there was a named vessel, there was no such implied term as was suggested in the present case. The contract in that case is set out in the report and the headnote reads as follows: "The plaintiff, "a master mariner, contracted with the defendants for a lump "sum to be paid him by the defendants to take a certain "specified steam-tug of the defendants, towing six sailing "barges, from Hull to the Brazils, the plaintiff paying the

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(1) [1911] P. 208, 231.
(2) [1913] P. 141, 147.
(3) (1922) 39 T. L. R. 37, 39.
(4) 7 Q. B. D. 598.
(5) 15 L. T. 619.
(6) 6 Q. B. D. 685.
(7) [1913] 3 K. B. 340.

"crew and providing provisions for all on board for seventy "days. The engines af the steam-tug were damaged and out "of repair at the time of the contract, but neither the plaintiff "nor the defendants were then aware of this. The consequence "however of the engines being so defective was that the time "occupied in the voyage was increased, and the plaintiff's "gain in performing his contract was much less than it would "otherwise have been. *Held*, by Brett and Cotton L.JJ., that "as the contract related to a specified vessel, there was no "implied undertaking by the defendants that it should be "reasonably efficient for the purposes of the voyage, and that "therefore the defective state of the engines gave the plaintiff "no cause of action, it not appearing that the engines were in a "worse state when the plaintiff took possession of the vessel "than they were at the time of the contract. *Held*, contra, "by Bramwell L.J., that the defective state of the engines gave "the plaintiff a cause of action, as there was an implied under-"taking by the defendants that the engines were not so "defective." Of course, I am bound by the decision of the majority of the Court of Appeal who decided that case, but it will be observed that that contract was not an ordinary contract of hire at all, and, indeed, it is to be observed that Cotton L.J., one of the two judges whose opinion prevailed, said so in terms. He referred (1) to *Smith* v. *Marrable* (2) and *Wilson* v. *Finch Hatton* (3), and said: "Each of those cases arose on a contract "of hiring, and in each the hirer was defending himself against "a claim for damages in respect of a refusal on his part to "perform his contract of hiring, while in this case the plaintiff, "who is (in my opinion erroneously) said to be in the position "of hirer, is suing for damages." As Mr. Holdsworth pointed out to me, it is pointed out in Halsbury Laws of England (2nd ed., vol. 16, p. 516 (m)): "*Robertson* v. *Amazon Tug* "*& Lighterage Company* (1) . . . . is sometimes cited as an "authority for the proposition that in cases where the contract "is for the hire of specific and ascertained chattel there is no "implied warranty of fitness. The bailment in that case, "however, was not a contract of hire, but was a contract by a "master mariner to take specified vessels to a certain port for "reward; see the judgment of Cotton L.J. at p. 609. It is "submitted that when carefully examined this case does not "support the proposition that the implied warranty does not

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(1) 7 Q. B. D. 598, 610.

(2) (1843) 11 M. & W. 5.

(3) (1877) 2 Ex. D. 336.

"arise in the case of the hire of specific chattels." I adopt that note as distinguishing *Robertson* v. *Amazon Tug & Lighterage Co.* (1) from the present case in which the contract is a simple contract of hire. I do not know that it was seriously suggested that in the case of an ordinary contract of hire there is a distinction between a ship and any other chattel, but there is authority for saying that a ship on hire is in the same position as any other chattel on hire. In my view, the present case is governed by cases like *Hyman* v. *Nye* (2) and *Jones* v. *Page* (3). Where a vessel or other thing is hired there is an implied term that the vessel or thing hired shall be as fit for the purpose as reasonable care and skill can make it. In my view the plaintiffs are right in saying that that term was implied in the present contract.

But it has been argued that the fact that the "Golden Age" caught fire does not of necessity show that it was not fit for the purpose for which it was hired. I think I am entitled to say that, when a motor launch catches fire, apparently for an entirely unexplained cause, there is a presumption that the launch was not reasonably fit for that purpose. The evidence was that the launch, including the engine, was in perfect condition at the commencement of the hire, except that there was evidence that when the engine was cold the device known as "tickling the carburettor" was necessary, and that that caused a certain amount of petrol to flow outside the engine into the bilge. It is quite clear that there was a leak of petrol somewhere or somehow. This engine caught fire and, in my view, it is necessary for the defendants to satisfy me that it was not through any fault of theirs. I do not think that the admission by the plaintiff husband to the fireman that he might have spilt some petrol was sufficient to rebut the presumption that there was something wrong with the engine, as is proved by the fact that it caught fire, and the defendant has not discharged the onus of showing that the fire was not caused through any deficiency in the engine.

One other matter has caused me considerable anxiety. There was no form of fire appliance on this vessel, except an extinguisher which was useless. It was argued for the plaintiffs that proper fire-fighting equipment was part of the necessary equipment of a motor launch, that failure to provide such equipment was a breach of the implied warranty of fitness

(1) 7 Q. B. D. 598, 610.
(2) 6 Q. B. D. 685.
(3) 15 L. T. 619.

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Lewis J.

and that the fact that the "Golden Age" had no proper fire-fighting appliances was therefore a breach of the implied warranty. I was not referred by counsel to any authority directly on the point as to whether the implied warranty of fitness, where there is one, requires that a vessel shall be provided with equipment that is unnecessary to make it go or with equipment such as any reasonable person would supply in order that the vessel should be safe. I do not know; I have tried to find whether there is any such authority and my researches have failed to find any case immediately in point. I venture to suggest that in the case of a ship or motor launch one knows that one of the essentials of the vessel is to have lights. The lights do not assist in making the vessel go, but I should be very much surprised to learn that a vessel which was hired out to be sent to sea without any port or starboard lights was as fit as reasonable care and skill could make it for the purpose for which it was hired. I hold therefore that the defendant was under an implied obligation to make the "Golden Age" as reasonably safe as care and skill could make it, that that obligation included an obligation to provide fire-fighting equipment, and that one of the causes of the loss that the plaintiffs have suffered was the failure by him to provide efficient fire-fighting equipment. There will therefore be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Payne & Co.*

Solicitors for defendant: *Jaques & Co., for Moore & Blatch, Lymington.*

R. P. C.

C.C.A.

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Oct. 25; *Nov.* 2.

Humphreys, Lewis and Jones JJ.

REX *v.* JONES.

Criminal law — Felony — Receiving — Accessory after the fact — "Receive, comfort, harbour, assist and maintain"—Direction to jury.

The appellant was charged as accessory after the fact to his wife who was convicted of receiving stolen property which was found in the house which she occupied with her husband. The only evidence against the appellant consisted of what he said and did on the occasion of a visit by the police to his house when the articles of stolen property were found. The appellant made no attempt to prevent the police from searching the house, but he made a number of untrue and evasive statements regarding the articles found there. The assistant recorder in summing up the case to the jury gave them no guidance as to the nature of the acts which might make the appellant an accessory after the fact, nor as to the acts relied on by the prosecution as constituting the offence. He also failed to point out to them that as the appellant was being questioned as a suspect who was himself liable to be charged with felonious receiving, it was for the jury to consider whether his evasions and untruths might not have been due to his anxiety to avoid arrest, apart from any consideration of his wife and her position.

Held, that in the circumstances of the case the failure to direct the jury on the above points rendered the summing-up defective to such an extent as to make the trial unsatisfactory.

APPEAL against conviction.

The appellant, James Leonard Jones, was indicted at Birmingham Quarter Sessions, with his wife Elsie Jones and one Twist, on charges of feloniously receiving a number of women's dresses, coats and similar articles which were proved to have been stolen between November, 1947 and May, 1948. Elsie Jones and Twist were convicted on some of the charges preferred against them, and did not appeal. The appellant was acquitted on all the counts against him charging receiving, but was convicted on six counts as an accessory after the fact to such of the felonies as the jury found were proved against his wife. The counts were all in the same form, and each alleged that he was an accessory after the fact to receiving stolen goods in that he, well knowing that Elsie Jones had received certain specified articles knowing them to be stolen, did between the date of that receiving and on dates thereafter, receive, comfort, harbour, assist and maintain the said Elsie Jones. The only evidence against the appellant on the charges on which he was convicted consisted of what he said and did on the occasion of a visit by the police to his house on May 9, 1948. It was agreed by the detective-inspector that on the occasion of this visit the appellant made no attempt to prevent the police from searching the house, in which a quantity of stolen articles were found in the various rooms, but he made a number of untrue and evasive statements regarding them. The appellant was convicted and sentenced to eight month's imprisonment. He appealed by leave of the court substantially on the ground of misdirection and non-direction of the jury.

J. Silverman for the appellant. There was no evidence which established that the appellant was an accessory after the fact to the receiving of which his wife was convicted. Further, no proper direction was given to the jury on the question of what acts on the part af the person charged will make him an accessory, or of the acts by the appellant on which the prosecution relied as establishing the offence. It was said by Erle J. in *Reg.* v. *Hansill* (1) " that you cannot make a man " an accessory from a bare receiving; there must be such a " receiving as tends to assist the felon." The assistance afforded to the felon must be directed to preventing him from being brought to justice, and mere words spoken by the person charged are not sufficient. In the present case, the untrue statements made by the appellant may have been spoken with the view of preventing his own arrest rather than with the object of assisting his wife, but the jury were never directed that that was a matter for their consideration. [He also referred to *Rex* v. *Rowley* (2).]

A. E. James for the Crown. There was no misdirection or non-direction on the question whether the appellant was an accessory after the fact. It is agreed that in order to make a person liable on that charge some act on his part must be proved which had the object of hindering the apprehension, trial or punishment of the felon. Although in the present case only words were used by the appellant, nevertheless those words being on his own statement untrue, gave rise to the inference that he was helping his wife as an accessory, in that he was trying to dissuade the police officers from making their search.

[Humphreys J. It is usually insisted that in the case of an accessory there must be some act on his part apart from words.]

It is submitted that words themselves may constitute an act.

Cur. adv. vult.

Nov. 2. The judgment of the court was read by Humphreys J. After stating the material facts it continued: The assistant recorder, who tried the case, left to the jury the receiving counts, directing them that it was open to them to find on the evidence that the stolen property was in the joint possession of husband and wife, and there was, in our opinion, ample material upon which the jury could find that the appellant was well aware that the articles were stolen. Indeed, it

(1) (1849) 3 Cox C. C. 597, 599. (2) [1948] 1 All E. R. 570.

may well be that the jury would have convicted the appellant upon those charges if they had not been afforded an opportunity of finding him guilty on what they probably regarded, having the indictment before them, as the minor offence of having assisted his wife throughout in her felonious dealings. In his summing-up the assistant recorder, after dealing with the evidence upon the receiving charges, proceeded as follows: "Assuming that you are not satisfied as to all or any of the "charges of receiving—that the property ever came into Jones's "possession, you will have to consider the remaining counts on "the indictment against him, that is to say, counts 12 to 20 in "which he is charged with what is known as being an accessory "after the fact. An accessory after the fact is one who, "knowing that another person has been guilty of felony, takes "some active step to conceal the felony and to prevent the "apprehension of the principal felon, and if it is material, "you will have to consider whether Jones's conduct was that "of a man taking active steps to conceal a felony committed "by Mrs. Jones, assuming, of course, that you think Mrs. Jones "was guilty of receiving. So much as to the position generally, "and you will have the indictment before you and you will "have to consider each charge separately. I come now to deal "with the evidence . . . ." And that was all. No further reference was made throughout the summing-up to the charges of being an accessory after the fact. That direction left the jury entirely without guidance as to what "active steps" (to use the language of the assistant recorder) by a husband in such a case as the present will bring him within the criminal law, or what steps were relied upon by the prosecution, and what was the significance of the evidence with regard to them. There was in our view, another serious omission from the summing-up in that the assistant recorder failed to point out to the jury that the appellant, on May 9, was being questioned by the police as a suspect, liable, as he knew, to be charged himself with felonious receiving, as indeed he was, so that it was for the jury to consider whether his evasions and untruths may not have been due to his anxiety to avoid arrest quite apart from any consideration of his wife and her position. A direction to a jury in the case of an accessory after the fact which was approved by this court is to be found in *Rex* v. *Levy* (1) where the common sergeant in stating a special case said: "I directed the jury that if they were satisfied that she

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(1) [1912] 1 K. B. 158.

" removed the things mentioned from Green's workshop, knowing that he was guilty of the felony charged against him, and " did so for the purpose of assisting him to escape conviction, " they should find her guilty." In our view, it was essential in the present case that the judge should specify the act or acts alleged to have been done by the appellant for the purpose of assisting his wife to escape conviction, and, further, to direct them specifically that if the motive in the mind of the appellant was merely a desire to avoid his own arrest, that would not be sufficient to bring him within the purview of this charge. There are offences couched in such plain terms that nothing more is required than a statement of the offence to enable a jury to say whether the evidence is sufficient to convict, but this charge of being an accessory after the fact is not one, and, in our opinion, calls for a reasoned direction to ensure that no injustice is done to the accused person.

The absence of any explanation to the jury upon the matters referred to renders the summing-up in the peculiar circumstances of the case defective to such an extent as to make the trial unsatisfactory. Without saying that there was no evidence upon which the appellant could be convicted, the evidence, properly considered was, in our opinion, very slight and called for a much fuller examination than it received at the hands of the assistant recorder. [The judgment then dealt with two other instances of alleged misdirection to the jury relied on by the appellant, which are not material to this report, and continued :] Whether the court would have thought it right to act upon either of these unfortunate slips in the summing-up if they stood alone, we need not decide. They do tend to strengthen the view that this conviction is most unsatisfactory and cannot be upheld. The appeal is allowed and the conviction quashed.

Appeal allowed.
Conviction quashed.

Solicitor for the appellant : *A. Hall-Wright & Son, Birmingham.*

Solicitor for the respondent : *M. P. Hugh, Birmingham.*

P. B. D.

Reversed. H.L. *sub nom.* ZIVNOSTENSKA BANKA NATIONAL CORPN. *v.* FRANKMAN. [1949] 2 All E.R. 671.

Reversed. ZIVNOSTENSKA BANKA *v.* FRANKMAN [1950] **A. C. 57**

FRANKMAN *v.* PRAGUE CREDIT BANK.

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Nov. 3, 4.
Lord Goddard C.J., Asquith and Singleton L.JJ.

Private international law—Deposit by Prague bank at its London office of Czechoslovakian bonds on behalf of Czech national—Devolution of title to bonds on naturalized British subject—Refusal by bank to deliver bonds in England to present owner—Conditions of business of bank—Construction of—System of law applicable—Lex loci contractus —Lex loci solutionis.

Before 1935 a Czech national bought on the London Stock Exchange through a Czech bank in Prague, three debenture bonds of 100*l.* each issued by a Czech company as part of their English issue and, with his consent, the bonds were deposited at the bank's London branch where they had since remained. On the death of the owner of the bonds in 1935, his sister P. F. who was also a Czech national and at that time domiciled and resident in Czechoslovakia, became entitled to the bonds. In 1938 she opened a current account with the branch of the defendant bank in Prague, and was informed that the bonds of which she was the owner were deposited at the London branch of the bank. At the same time she was sent the bank's conditions of business. Condition 11 thereof was as follows: "As regards such stocks and securities as were purchased at a "stock exchange other than that of Prague . . . . we shall not "have the same sent to us unless the customer has ordered the "transmission thereof at his own expense and risk, but will leave "the same at the risk and expense of the customer, deposited with "our correspondent where they shall be subject to the legal "measures of the respective country . . . ." Condition 50 was in the following terms: "The place of performance and payment in "respect of all obligations resulting from the business connexion "between us shall be considered to be the place of that department "of our establishment which has carried out the relevant "transaction with the customer except in so far, however, as any "special stipulation has been made in this connexion." In March, 1939, P. F. came to England and resided there until her death in 1945. On her death, her son, the plaintiff who was resident in England and was a naturalized British subject, became administrator of her estate, and asked the London branch of the bank to deliver the bonds to him. The London branch refused to do so on the following grounds: (1.) By cond. 50 of the bank's conditions of business the place of discharge in respect of the bonds was Prague and not London. (2.) P. F. having been a Czech emigrant, was, even after arrival in England and although she had become an "exchange foreigner," subject to Czech foreign exchange regulations. (3.) By para. 17 of the Czech foreign exchange law of 1946, re-enacting previous exchange regulations an "exchange "citizen" could only transfer securities to an exchange foreigner with the permission of the National Bank of Czechoslovakia. (4.) The Prague bank was an exchange citizen but the plaintiff was an exchange foreigner. (5.) Permission of the National Bank of Czechoslovakia was therefore necessary before the Prague bank, through its London branch, could deliver the bonds to the plaintiff, but such permission had been refused.

Held that the contract for the purchase of the bonds having been made in Czechoslovakia would undoubtedly have been governed by the law of that country, but since the bank in pursuance of cond. 11 of their terms of business were holding the bonds for safe custody at their branch in London, they were subject to the law of this country and the plaintiff having established his claim to them, was entitled to delivery of them by the bank.

Decision of Cassels J. [1948] 1 K. B. 730 reversed.

Appeal from Cassels J.

The plaintiff, a naturalized British subject, brought an action against the Prague Credit Bank for the delivery to him in England of three debenture bonds of 100*l*. each issued by the Skoda Works, Ld., Czechoslovakia, as part of their English issue. The plaintiff's title to the deeds was acquired as follows: In 1930, Dr. R. Weiner, a Czechoslovakian national living near Prague, who was the brother of the plaintiff's mother, ordered the bank in Prague to buy the three debentures in question in London. The bonds were duly bought on the London stock exchange, and with Weiner's consent, were deposited in the bank's London branch. Weiner died in 1935 and his sister, Mrs. Paula Frankman, the plaintiff's mother, succeeded to his estate including the three 100*l*. bonds. In 1938, Mrs. Frankman, who at that time lived near Prague, transferred her account to the head office of the defendant bank in that city. On March 22, 1938, the bank wrote to Mrs. Frankman saying that they had credited her with the debentures, which they stated were held in London. At the same time they sent her a copy of their business conditions. Condition 11, so far as material, was in the following terms: " As regards such stocks " and securities as were purchased at a stock exchange other " than that of Prague or were received by any bank other than " a Prague bank, we shall not have the same sent out to us " unless the customer has ordered the transmission thereof " at his own expense and risk, but will leave the same, at the " risk and expense of the customer, deposited with our " correspondent, where they shall be subject to the laws of " the respective country."

By cond. 50: " The place of performance and payment in " respect of all obligations resulting from the business connexion " with us shall be considered to be the place of that department " of our establishment which has carried out the relevant " transaction with the customer, except in so far, however, as "any special stipulation has been made in this connexion."

On April 27, 1938, the bank wrote to Mrs. Frankman informing her that having received no instructions from her regarding the place of custody of the bonds, they notified her that they were deposited with the London branch of the bank. Mrs. Frankman came to England in March, 1939, and remained there until her death on August 16, 1945. She had received dividends from time to time on the bonds, which dividends were credited to her in Prague until she closed her current account there in 1942. The plaintiff took out letters of administration of his mother's estate, and being her sole next of kin, the debentures passed to him, and in due course he claimed the bonds from the London branch of the bank. The bank refused the plaintiff's request on the following grounds: (1.) By cond. 50 of the bank's conditions of business, the place of discharge or payment in respect of the bonds was Prague and not London; (2.) as the plaintiff's mother had been a Czech, she was, by para. 20 of the Czech foreign exchange regulations, even after her arrival in England, and in spite of the fact that she had become an "exchange foreigner," subject to the Czech foreign exchange regulations, and, therefore, her administrator was equally subject to them; (3.) para. 17 of the Czech foreign exchange law of 1946 re-enacted para. 10 of the Czech foreign exchange regulations, which provided that an "exchange "citizen" was not allowed to transfer securities to an "exchange foreigner" without the permission of the Czech National Bank. The Prague bank was an "exchange citizen," but the plaintiff was an "exchange foreigner," therefore the Prague bank through its London branch was not entitled to deliver the bonds in England to the plaintiff, without the permission of the Czech National Bank, which permission had been refused. (4.) The bank also relied in the court below on the Bretton Woods Agreement Order in Council, 1946 (St. R. & O. 1946, No. 36) made under the Bretton Woods Agreement Act, 1945, as rendering the plaintiff's claim unenforceable. Cassels J. held that under cond. 50 of the bank's conditions of business the place of performance of all obligations as between the defendants and the plaintiff must be taken to be Prague; and that, consequently, the performance of the contract was governed by Czechoslovakian law under which it could not be performed without the permission of the National Bank of Czechoslovakia, which had been refused. In his view the lex loci contractus and the lex loci solutionis were both in Czechoslovakia. Cassels J. also held that the plaintiff could not claim the delivery of the bonds in England by reason of the terms of art. VIII, s. 2 (*b*), of the Bretton Woods Monetary Fund Agreement, which was given the force of law by the schedule to St. R. & O. No. 36, made under the powers given by s. 3 of the Bretton Woods Agreements Act, 1945. He, therefore, gave judgment for the defendants. The plaintiff appealed.

Neville Laski K.C. and *R. J. S. Thompson* for the plaintiff.

Sir Valentine Holmes K.C. and *J. P. Ashworth* for the defendants.

The arguments sufficiently appear from the report of the proceedings in the court below. The defendants did not seek to uphold the judgment of Cassels J. on the ground last stated above.

LORD GODDARD C.J. stated the facts and continued: A great deal of time was taken up in the course of the case with the evidence of a Czech lawyer with regard to the Czech law regulating matters of foreign exchange and similar questions. It is not necessary to go through that evidence in detail and it is sufficient to say that the laws in force in Czechoslovakia at all material times made it illegal for a resident Czech subject, or as he is called " an exchange citizen " to transfer any property to a " non-resident " or " exchange foreigner " as persons resident outside Czechoslovakia are called, without the consent of the National Bank of Czechoslovakia. So far as that part of the case was concerned, the Czech lawyer agreed that for the purpose of the law the English branch of the defendant bank was to be regarded as an " exchange foreigner." Ex hypothesi, the plaintiff was an " exchange foreigner," and the lawyer agreed that there was nothing in Czech law to prevent a transaction of any nature taking place between two " exchange " foreigners." It is quite clear, therefore, that if the plaintiff had, let us say, a current account with the defendant's branch in London, there would be no reason why that branch should not honour his cheques, because both the bank and the plaintiff being " exchange foreigners," the law of Czechoslovakia had no application to them, and did not purport to prohibit and could not, of course, prohibit, transactions between two parties who were not subject to its jurisdiction.

But what is said in this case is that by the terms of the contract made between Mrs. Frankman and the bank, the bonds

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in question could only be demanded in Prague and, therefore, it would follow that as the contract provided that the bank was only bound to deliver them in Prague, the handing over of the bonds to the plaintiff would, in effect, be a transfer by the Czech bank, an " exchange citizen," to an " exchange foreigner " and would accordingly be prohibited. The whole case appears to me to depend on the construction of the conditions of business of the bank which were sent to Mrs. Frankman and which contain the conditions and terms on which they were holding the bonds which she wished should remain with the bank for safe custody. I will now look at cond. 11 a little more closely. It provides that securities bought by the bank on a stock exchange other than that of Prague will not be " sent to us " unless the customer has ordered the transmission thereof at " his own expense and risk but will " be left " deposited with " our correspondent." That must, of course, mean the correspondent who has bought the securities for the customer, and as in this case the debentures were originally bought on the London stock exchange, the correspondent would be the London branch of the bank. The condition continues: " where they " shall be subject to the legal measures of the respective " country." In other words the bank will leave the certificates or other documents of title to the securities which they have bought, in the place where they bought them, and they will be subject to the laws of that country. Condition 50, on which so much reliance was placed, is as follows: " The place of per-" formance and payment in respect of all obligations resulting " from the business connexion with us shall be considered " to be the place of that branch of our establishment which " has carried out the relevant transaction with the customer, " except in so far as any special stipulation has been made in " this connexion." Mr. Laski argued, and I think that there is a great deal to be said for the argument, that when the whole of the conditions, and what I may call the fasciculi of the different paragraphs are examined, cond. 50 is not dealing with such matters as the buying of stocks and shares at all, and that the fasciculi of clauses, some of which precede, and some of which follow the clause I have read, show that cond. 50 is really only dealing with the payment and collection of moneys. It is well-known law, and I should be the last to throw any doubt upon it, that if a person has a current account at a bank which has been opened and kept for him at a particular branch, his transactions with the bank, so far as his current account is

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concerned, must be carried out with that branch. If I bank at branch A., then, subject to any special arrangements, which it is well known are now very commonly made for enabling customers to cash cheques at other branches, prima facie, I cannot demand that my cheque shall be cashed anywhere else. If I take a cheque into a branch of my bank where my account is not kept, the bank is not bound to honour the cheque, and they do not commit any breach of their contract with me if they say: "You must take your cheque to the branch where "you keep your account." No one would say that that would be a wrongful refusal to honour the cheque. In the same way if I want to pay money into my bank and my account is kept in London, in the absence of any special facility which the bank may give, and which they commonly give nowadays, though they are not, of course, bound to do so, the bank would not be obliged to accept a credit which I chose to pay in at some other branch. In practice they would probably do so, because they would say "We will take the "money and send it to London." but generally speaking transactions relating to current accounts and also those relating to bills of exchange in which the customer is interested, must be conducted at the branch at which the account is kept. I think there is a great deal to be said, though I do not feel it necessary to give a concluded opinion on it, for the view that when regard is paid to the context in which cond. 50 is found in these conditions of business, it really has nothing to do with the deposit of the debentures in the present case. But assuming that it does apply to these debentures and not merely to the operation of the current account, how does it fit in with cond. 11? Let it be assumed that a customer orders the bank in Prague to buy shares for him on the London Stock Exchange in accordance with the bank's terms of business. How do the conditions work? The shares are bought on a stock exchange other than that of Prague, London, for instance, therefore, in accordance with cond. 11 they will not be sent to Prague unless the customer has so ordered, and then it will be at his own expense and risk. The shares will be left in London at the expense and risk of the customer. They will be "deposited "with our correspondent" and will then be subject to the laws prevailing in this country. Once the shares have been bought, that part of the transaction is at an end. The shares will lie with the correspondent in London and, if they are to be kept there for safe custody, they will then be held for safe custody, because they are the property of the customer, held in the hands of the bank, which does not claim that it has a lien on the shares or that they are being held as security in any way. How does that provision work in with cond. 50? That condition says: "The place of performance of all obligations "resulting from the business connexion with us shall be "considered to be the place of that department of our establish-"ment which has carried out the relevant transaction." So far as the safe custody of the shares is concerned, the branch that is carrying out that obligation is the branch in London which has the bonds in its possession and is holding them in London for the customer. It is said that Mrs. Frankman had not an account in London. Be it so. She had no account in London, but the shares were there because the bank stipulated that they should be left in London unless she gave special orders to the contrary and agreed to their being sent to Prague at her cost and expense. The shares were left in London and were to be held there according to the laws of England. It, therefore, seems to me that cond. 11 itself provides what law is to govern the contract since it says that once the debentures have been deposited, the law applicable is that of England not that of Czechoslovakia. What happens next? The plaintiff, Mrs. Frankman's representative, being in this country asks the bank for his property. It is said, among other arguments put forward on behalf of the bank, that the plaintiff was not a customer of the London branch and therefore could not demand his property from that branch, but must demand it back in Prague. That is an argument with which I cannot agree. All that the plaintiff has to show is that these three bonds, which were bought by Dr. Weiner and which were designedly left in London under the terms of the contract which Dr. Weiner entered into with the bank, were his property. Once it is established and agreed, as it was in this case, by the evidence of the lawyer called by the defendants, that there is, according to Czech law, even if that law governed, nothing to prevent or make illegal a transaction between two "exchange "foreigners," as both the parties were in this case, no difficulty arises. I think, however, that as soon as the bonds were bought, the transaction which would undoubtedly be governed by Czechoslovakian law, since the contract was made in Czechoslovakia, came to an end. The bank, having fulfilled the mandate to purchase, were holding the debentures for safe custody in their branch in London, and thereupon, in my view, the debentures became subject to English law and, consequently, as the plaintiff has proved his claim to them, he is entitled to maintain this action.

ASQUITH L.J. I agree. This appeal would seem to turn on the application to the facts of this case of the rules of English private international laws. Their application seems to me to result in two conclusions, amongst others: First, that the contract between Mrs. Frankman and the bank, entered into in 1938, was governed by Czechoslovak law, the lex loci contractus; but, secondly, that, if and so far as construed by that law, the contract provided for obligations to be performed in England, such obligations were intended to be governed and should be treated by English courts as governed by the municipal law of this country, the lex loci solutionis; and are accordingly not affected by Czech domestic legislation, such as the exchange or currency regulations which have played so great a part in this case (even if those regulations were otherwise applicable to the case, having regard to the evidence about the transaction being between two "exchange "foreigners.")

That being so, the appeal turns largely on whether the material obligations were to be performed in Czechoslovakia or in England.

What were those obligations? The obligations of the Prague bank under the contract were (*a*) to keep in safe custody the three bonds belonging to Mrs. Frankman, and later to the plaintiff, (*b*) to re-deliver them to the owner against a valid demand for re-delivery, and (*c*) to perform each of those obligations in accordance with the written conditions of the contract furnished to Mrs. Frankman at the time when it was concluded and acquiesced in by her.

The Prague bank performed the first of those obligations, that of safe custody, as it was entitled by cond. 11 to do in the case of securities of this class, vicariously; that is, not by getting the bonds transmitted to its Prague branch or headquarters, but by causing or permitting its London branch to retain physical possession of them.

If it had elected to discharge its obligations as custodian by itself assuming and retaining physical possession in Prague, it might very well have been necessary for the owner of the securities, the plaintiff, to have made a demand in Prague as a condition precedent to his right to re-delivery. Since, however,

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the bank asserted its contractual right under cond. 11 to have the bonds retained in the hands of its London branch, it seems to me implicit in its election to do so, and in the arrangement generally, that the depositor, who was at the material time in England, could validly assert his right to re-delivery by a demand addressed to the defendants' London branch, where the bonds were, instead of resorting to the circuity of addressing such a demand to the Prague branch, where they were not.

I therefore think that, for these reasons, the demand was valid and the refusal to re-deliver unjustified.

It is arguable that a similar result might be reached by applying the conditions of cond. 50 to the facts. That provision has been read and I need not repeat it. The obligation to re-deliver falls within the literal scope of the words " all " obligations resulting from the business connexion with us " ; that is, with the bank. " The place of performance," further to quote the language of cond. 50, " is the place of that department " ment of our establishment which has carried out the relevant " transaction with the customer, except in so far as any special " stipulation has been made in this connexion."

I think that " the department of our establishment which " has carried out the relevant transaction with the customer " could be construed as meaning the London department or branch, upon which the actual function of custody of the bonds devolved in the events which happened.

It is true that there is a possible ambiguity, as these words might equally mean the department or branch which negotiated the contract ; that is, the Prague branch of the bank. The Czech lawyer called for the defendants assumed that it meant this last, without apparently appreciating that there is any possible ambiguity or possible application of the principle " contra proferentem."

On the whole, I would not rest my conclusion on cond. 50. There is great force, I think, in Sir Valentine Holmes' argument that the words " transaction with the customer " do not fit in comfortably with the construction which I have suggested— a construction which requires a transaction " for the customer," if it is to relate to services de facto rendered to the customer rather than services stipulated for ; but, while cond. 50 may not help, I do not think that it hinders the plaintiff or that it invalidates the conclusion drawn from cond. 11. Condition 50, in spite of the apparent generality of its language when it speaks of " all obligations " comes at the end of a number of

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provisions quite unconnected with the custody of securities, whereas cond. 11 deals specifically not only with the custody of securities but with that of securities of the limited class here involved.

For these reasons, I think that the appeal should be allowed.

SINGLETON L.J. I agree.

Appeal allowed.
Judgment for the plaintiff.

Solicitors for the plaintiff: *W. R. Bennett & Co., for Barrow-Sicree & Co., Manchester.*

Solicitors for the defendants: *Freshfields.*

P. B. D.

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Nov. 4, 5, 18.

Tucker and Cohen L.JJ. and Birkett J.

LANGHAM *v.* MAYOR, ETC., OF THE CITY OF LONDON.

Tithe — Extinguishment — Consequent loss of office — Compensation for "substantial detriment to his livelihood"—Meaning of—Particulars to be furnished of grounds of, and circumstances supporting, claim—City of London (Tithes) Act, 1947 (10 *&* 11 *Geo.* 6, *c.* XXXI), *s.* 16.

The City of London (Tithes) Act, 1947, which extinguished tithes and tithe rates in the city, by s. 16 requires the corporation to pay compensation out of the tithe revenue account to any officer in office at the date of the passing of the Act who establishes that by reason of the passing of the Act he has suffered "substantial detriment to his livelihood." The word "substantial" refers to the loss which an officer has in fact suffered by the abolition of his office and he is not bound to furnish evidence of his total income in order to enable the corporation to decide whether there has been a substantial detriment to it.

APPEAL from decision, on a preliminary point of law, of the judge of the Mayor's and City of London court.

By s. 16, sub-s. 1, of the City of London (Tithes) Act, 1947, the primary object of which Act was to extinguish tithes and tithe rates in the City of London, it is provided that "Every "officer in office at the date of the passing of this Act who "suffers substantial detriment to his livelihood by reason of the "passing of this Act shall be entitled to compensation from the "corporation for that detriment." By sub-s. 2 a claimant is required to make his claim within six months and to furnish in writing particulars showing the grounds of, and the facts and circumstances supporting his claim. Sub-section 3 authorizes the corporation, " if satisfied that the detriment is established," to pay compensation out of the tithe revenue account. Under s. 16, sub-s. 2, a number of officers (including the plaintiff Langham, a solicitor holding the office of clerk to the Commissioners of Tithes of the Rector's Stipend, St. Andrew, Holborn, for which he received remuneration amounting to 75*l*. per annum) claimed compensation. For the purpose of ascertaining whether a claimant had suffered substantial detriment to his livelihood the corporation sent to claimants a questionnaire which in effect required the recipient to disclose (inter alia) his total income. The plaintiff, and a number of other claimants, refused to give this information and their claims being thereupon rejected by the corporation they appealed under sub-s. 5 of s. 16 to the judge of the Mayor's and City of London court, to whom was submitted, as a preliminary point, the question whether or not the plaintiff " was bound to furnish evidence of his total income, in order " to enable the corporation to decide whether there had been " a substantial detriment to his livelihood." The learned judge decided the question in favour of the plaintiff, and the corporation appealed.

Fox-Andrews K.C. and *Heathcote-Williams* for the corporation. To determine what is the meaning of the words " substantial detriment to his livelihood " sub-s. 1 of s. 16 must be examined in the light of sub-ss. 2 and 3. By sub-s. 3 the corporation have to be satisfied that the detriment is established. It is not merely detriment, or even substantial detriment, but it must be substantial detriment to the claimant's livelihood. Unless they know how and to what extent the claimant's livelihood is affected by the detriment alleged the corporation cannot be satisfied that he has suffered substantial detriment to his livelihood. For the purpose of this case " livelihood " includes income. By sub-s. 2 an obligation is placed on a claimant to make his claim within six months and to make a statement in writing showing the amount of compensation claimed, the grounds for the claim, and the facts and circumstances supporting it. The most relevant circumstance must be the extent to which the claimant's livelihood is affected and diminished. It is impossible to determine whether the loss of office is a substantial

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detriment to a claimant's livelihood unless you know what is his total income. To decide whether a thing is substantial you must be able to compare it with something. A claimant under this Act does not show that he has suffered substantial detriment to his livelihood by reason of the passing of the Act by merely asserting that he no longer enjoys the emoluments of a particular office. If Parliament had intended to give compensation merely for loss of office it would have said so, and it has done so in other statutes. The Tithes Act, 1936, contains no provision corresponding to s. 16.

Capewell K.C. and *L. A. Blundell* for claimant. This is a private Act. There was a petition against it, and if there is any ambiguity s. 16 must be construed in favour of the claimant. In the case of a solicitor holding one of these offices in the City of London you cannot assess the extent to which his livelihood is affected by the loss of that office merely by comparing the emoluments of the office with the claimant's total income. If the corporation are entitled to be told the total income of the claimant then they must also take into account such matters as the loss of status through the loss of office. It would be quite wrong to read into this private Act words which would have the effect of creating a means test. It is submitted that "substantial" in s. 16 means "not "unsubstantial." It is intended merely to rule out claims which are trivial. This is in no sense a solatium. It is compensation for loss of office as of right, subject to limitations, and if the intention had been that the income with which a claimant was left was to be taken into account—if the test was to be whether or not the claimant needed the compensation—it would not be compensation at all but a grant.

Cur. adv. vult.

Nov. 18. TUCKER L.J. I will ask BIRKETT J. to deliver the first judgment in this case.

BIRKETT J. This is an appeal from the judgment of Judge Thomas, given at the Mayor's and City of London court on May 26 of this year. The appellants are the corporation of London, the defendants in the court below. The plaintiff, Arthur Cuthbert Langham, is a solicitor, and since July 2, 1935, he had held the position of clerk to the Commissioners of the Rector's Stipend, St. Andrew, Holborn, at an annual salary of

75*l*. a year. This appointment, though strictly determinable upon reasonable notice, had come to be regarded in practice, and in past experience, as a permanent one, and, indeed, the father of the plaintiff had held this appointment for fifty years.

The City of London (Tithes) Act of 1947 was passed in July, 1947, and had for its purpose the extinguishing of tithes and tithe rates in the city of London. Section 16, sub-s. 1, of the Act reads as follows: "Every officer in office at the date of the "passing of this Act who suffers substantial detriment to his "livelihood by reason of the passing of this Act shall be entitled "to compensation from the corporation for that detriment." It was further provided, by sub-s. 5 of s. 16, that if the corporation disallowed any claim, in whole or in part, the claimant could appeal to the Mayor's and City of London court, and that court had power to confirm, override or vary the decision of the corporation. On December 12, 1947, the plaintiff made his claim in writing, claiming the payment of 225*l*. as a capital sum which he had paid on being admitted to partnership in respect of this appointment, being, as he alleged, a sum equal to three years' net profits, that is three times 75*l*. He also claimed an annual payment during his lifetime of 33*l*. 15*s*. 0*d*. In January, 1948, the town clerk wrote to the plaintiff asking for "full details as to the extent of your livelihood," and on February 4 the plaintiff wrote declining to furnish such details. On February 5 the town clerk wrote again to the plaintiff, repeating his request, and stated in the letter "It must be clear "to you that whilst a claimant with a total income of say 300*l*. "per annum suffers substantial detriment to his livelihood by "the cesser of say 50*l*. per annum, the claimant with a total "income of say 3,000*l*. per annum does not." The plaintiff having failed to comply with the demand in the letter from the town clerk, the corporation disallowed the claim, stating that without the information as to his livelihood they were unable to form any judgment on the question of substantial detriment.

The matter went accordingly to the Mayor's and City of London court, and it was agreed between the parties that certain preliminary points should be first tried, the second of those points being: In making a claim upon the corporation, was it incumbent upon the claimant to furnish any and what evidence of his financial circumstances other than the emoluments of the office lost. The learned judge found that the corporation were not justified in insisting on a claimant giving details of his total income, and from that judgment they appeal to this court. Two passages in the judgment of the learned judge will be

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enough to show the grounds on which his judgment was based. He said: "In my view, really the only question I have to "decide on this part of the application is whether 'substantial' "here means such a detriment as will take from a man a large "portion of his livelihood or whether it means that it will take "something from him which is more than a trifling, trivial "matter which ought not to be considered"; and again, he said: "That being so, it does not seem to me possible that "where a man shows or puts forward a claim, which for this "purpose one must consider is more or less justified, of 2,500*l.*, "or 86*l.* per year, it can be necessary for the person who is "considering whether there is a substantial detriment to his "livelihood to know what the total income is."

In this court it was submitted on behalf of the corporation that it was impossible to decide whether there had been a substantial detriment to the livelihood of the plaintiff without knowing what that livelihood in fact was, and the demand for a financial return of income was therefore justified. For the plaintiff it was submitted that the learned judge was right in his conclusion; that the statute did not require the claimant to supply the details of his means of living; and that the question raised by the statute could be decided on the statement of facts supplied by him, which showed the actual loss sustained. This appeal was not concerned with any questions of amount but was confined solely to the proper answer to the agreed question.

When considering the wording of s. 16, sub-s. 1, it is to be remembered that this is a private Act of Parliament, which has the effect of depriving certain persons of income formerly enjoyed by them, and the rule of construction to be applied must be, I think, that where doubt arises the words must be understood most strongly against him who uses them. The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the enactment grants, and against those who claim to use them. (See Maxwell on the Interpretation of Statutes and Lord Macnaghten in *Herron* v. *Rathmines & Rathgar Improvement Commissioners* (1). To deprive him by a private Act of Parliament of the right to do what he was doing for reward at the passing of the Act requires clear and unequivocal words in the private Act. (See *Bournemouth-Swanage Motor Road and Ferry Company* v. *Harvey & Sons* (2)).

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(1) [1892] A. C. 498, 523.

(2) (1928) 98 L. J. (Ch.) 118.

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Applying these rules of construction to the section, it is scarcely to be supposed that any compensation to be paid was to be dependent on the amount of income owned or enjoyed by the claimant. If so, it could be introducing a means test of a most unusual kind. The question then would not be the question in the section, namely, " Is this a substantial detriment to his livelihood ? " but a different question, namely, " Is this a substantial detriment to his livelihood, having regard " to his financial position ? " If that had been intended, the statute could easily have said so, but I do not think that such a construction is warranted by the provisions of this private Act. The question for the corporation is whether the loss suffered by the plaintiff, in ordinary language, is a thing of substance as distinct from a loss that is trivial and not worth consideration. If that be the right construction, the question can well be determined without knowing the total means of the plaintiff. I do not think that the compensation to be paid should depend on whether a claimant is rich or poor. These are comparative terms, and it might be necessary to go into all the details of a claimant's private life if poverty or riches were elements in the assessment. The statute is taking away something a man formerly possessed, and he is entitled to have the section strictly construed. If the loss is a substantial detriment to his livelihood in the natural and ordinary meaning of words, he is entitled to compensation whether he be otherwise rich or poor, and that question can be determined without requiring the claimant to produce evidence of means.

I have come to the conclusion that the learned judge was correct in his finding and that this appeal should be dismissed.

TUCKER L.J. I agree with the judgment which has been delivered by BIRKETT J., and I do not wish to add anything with regard to the construction of s. 16 of the City of London (Tithes) Act, 1947. I do, however, desire to make some observations on the manner in which this matter has been brought before us. A number of similar cases were pending before the Mayor's and City of London court, and it was thought convenient to deal with this as a test case, by submitting a preliminary question to the judge for his decision, framed somewhat in the manner of a consultative case for the opinion of the court. There were no pleadings, there was no agreed statement of facts in writing, and the question submitted was not very aptly framed. The learned judge seems, with the tacit consent of the parties, to

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have amended the question so as to confine it to the point really at issue in the following words: Whether or not the claimant was bound to furnish evidence of his total income in order to enable the corporation to decide whether there had been a substantial detriment to it or to his livelihood. In substance, what the learned judge was really asked to decide was whether the corporation were justified in dismissing Mr. Langham's claim in limine by reason of his refusal to disclose full details of his financial position. In order to avoid involving the parties in further expense I am content to deal with this appeal on the basis that the question submitted for decision as a preliminary issue was intended to be, and was, in fact, dealt with as if it had been framed as indicated above. These attempts at short cuts seldom achieve their purpose and I am by no means certain that even now other points of difference may not arise. If this should unhappily occur I hope that some case will be tried out to the end and finally determined before it is brought again to this court.

COHEN L.J. I have had the opportunity of reading the two judgments which have been delivered, and I do not desire to add any reason of my own in concurring in the view that this appeal fails.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitor for corporation: *Comptroller and City Solicitor.*
Solicitors for plaintiff: *Sharpe, Pritchard & Co.*

A. W. G.

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Nov. 12, 23.
Tucker and Asquith L.JJ. and Harman J.

HASTINGS & FOLKESTONE GLASSWORKS LIMITED *v.* KALSON.

Company — Director — Memorandum and articles of association — Disqualification — " Convicted of an indictable offence " — Conviction of offence against Defence (Finance) Regulations, 1939, *by court of summary jurisdiction.*

The defendant, a director of the plaintiff company, was convicted by a court of summary jurisdiction of an offence against reg. 4 of the Defence (Finance) Regulations, 1939, in that being resident in the United Kingdom and being entitled to sell gold (sovereigns) he failed to offer that gold to H.M. Treasury or to a person designated by the Treasury. By reg. 9 of the Defence (Finance) Regulations the provisions of part V of the Defence (General) Regulations, 1939, are made available for the purpose of the enforcement of the Finance Regulations. By art. 92 of the Defence (General) Regulations a person guilty of an offence against any of these regulations shall on summary conviction or on conviction on indictment be liable to imprisonment or fine, or both. The defendant was fined 200*l*. and the sovereigns recovered were confiscated.

By the plaintiff company's articles of association it was provided that should a director be " convicted of an indictable offence, " not being an offence under the Road Traffic Act " his directorship should be vacated—and this event would also operate to determine his employment as a co-manager of the company. An action brought by the plaintiff company for a declaration that the directorship was vacated was dismissed by Oliver J. on the ground that the defendant having been tried by a court of summary jurisdiction had not been convicted of an " indictable offence." On appeal :—

Held, that the words " indictable offence " in the articles of association referred to the character and gravity of the offence committed and not to the proceedings by which the prosecution elected to seek a conviction ; that the defendant had been convicted of an offence for which he could have been indicted and a declaration in the terms asked for should be granted.

APPEAL from Oliver J.

The plaintiff company, which was incorporated on January 20 1947, carried on business at Hastings and Folkestone. By its memorandum and articles of association the defendant, Jack Jacob Kalson, was appointed a permanent director of the company to hold such office for life unless he should become disqualified. By art. 26 it was provided that he should be disqualified and the office of director should be vacated if he was " convicted of an indictable offence, not being an offence " under the Road Traffic Act, 1930, or any statutory provision " in lieu or modification thereof." By an agreement of April 30, 1947, between the company and the defendant, it was agreed that the defendant should serve the company as co-manager so long as he should hold the office of director and that if at any time he should become disqualified or cease to be a director his employment under such agreement should forthwith determine.

At Bow Street magistrate's court on or about October 15, 1947, the defendant was convicted of an offence against reg. 4 of the Defence (Finance) Regulations, 1939, in that being in

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the United Kingdom and being entitled to sell gold, to wit: 150 sovereigns, he failed to offer that gold for sale to H.M. Treasury or to a person designated by the Treasury. The defendant pleaded guilty and on conviction was fined 200*l.*, plus 20*l.* costs and 120 of the sovereigns which had been recovered were confiscated.

On March 22, 1948, before Oliver J. at Hastings Assizes, the plaintiff company claimed (*a*) a declaration that as from the date of the aforesaid conviction the defendant was disqualified from acting as a director of the plaintiff company and that his said office of director was vacated and that his employment as a co-manager of the plaintiff company had determined, (*b*) an injunction to restrain the defendant from purporting to act as director or co-manager of the plaintiff company. Oliver J. dismissed the action and the plaintiff company appealed.

Sir Valentine Holmes K.C. and *George Pollock* for plaintiffs. The short point for decision in this appeal is what is the meaning in the English language of the word "indictable." It is submitted that the words "indictable offence" in the articles of association refer to the quality of the offence and not to the court which tries it. If an accused man had committed theft or manslaughter at a time when he is subject to military law, it would be an indictable offence though he might be tried by court martial, and the conviction would be of an indictable offence. All breaches of the public law punishable by fine or imprisonment are indictable unless a statute either expressly or by implication excludes the liability of the offender to be indicted. Originally all offences were indictable, and it was not till about the fifteenth century that statutes began to be passed which excluded the liability of the offender to be indicted. *Rex* v. *Kakelo* (1) was the first case which decided that where a statute created an offence punishable by fine or imprisonment on summary conviction that provision precluded the liability to be tried on indictment. If, however, the defendant elects to be tried by jury the offence is at once turned into an indictable offence. The defendant seeks to construe the articles of association as meaning "convicted on indict-"ment," and Oliver J. has found that the words "convicted "of an indictable offence" refer to the court which convicted the offender, but it is submitted that that was a wrong construction. The offence of which the defendant was convicted was capable of being dealt with on indictment and was clearly an indictable offence.

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(1) [1923] 2 K. B. 793.

[The Summary Jurisdiction Act, 1879, s. 17; The Criminal Justice Act, 1925, s. 24, and sch. 2; The Finance (Defence) Regulations, rr. 4, 9, made under the Emergency Powers Defence Act, 1939; and the Defence (General) Regulations, 1939, r. 92 were referred to.]

Thesiger K.C. and *Neave* for defendant. A man can only be said to be convicted of an indictable offence if he is convicted on indictment, or convicted summarily of an indictable offence under the provisions of the Criminal Justice Act, 1925, sch. II. The article of association imposes a disqualification or penalty on a director and therefore must be construed strictly. It seeks to distinguish more serious and less serious offences and does so by reference to the criminal law and criminal procedure and therefore takes one straight to the well-known distinction in criminal law between a summary offence and an indictable offence. It clearly intends to exclude from its operation a summary conviction for a summary offence. The matter must be looked at as at the moment when the defendant pleaded guilty and at that moment when the prosecution elected to proceed summarily, the offence became a summary one, notwithstanding that when committed it was indictable. An offence is not indictable within the meaning of art. 26 unless the accused at the commencement of the proceedings is in peril of being committed for trial on indictment, or unless he can elect to go to trial by jury and does so elect.

Cur. adv. vult.

Nov. 23. TUCKER L.J. The short question in this appeal is whether the defendant was "convicted of an indictable offence." As to the nature of the offence with which he was charged there is no question, and as to the fact that he was convicted there is equally no question. It is submitted on behalf of the plaintiffs that the only remaining question is, therefore, whether the offence was "indictable," and it is said that this means capable of being dealt with on indictment and that this was an offence which when committed was capable of being dealt with on indictment, notwithstanding that the prosecution in fact subsequently elected to deal with it, as they were entitled to do, as a summary offence. Mr. Thesiger, in an admirable argument on behalf of the defendant, contended that the matter must be looked at as at the moment when the defendant pleaded guilty, and that at that moment, by the election of the prosecution, the offence had in fact become a summary one notwithstanding that when committed it was indictable. Mr. Thesiger argued that " convicted of an indictable offence " means either convicted on indictment or convicted summarily of an indictable offence triable summarily, being one of the offences enumerated in the second schedule to the Criminal Justice Act, 1925. He says that an offence is not indictable within the meaning of art. 26 unless the accused was at the commencement of the proceedings in peril of being committed for trial on indictment, or unless the case is one in which he can elect to go to trial and has in fact so elected, from which moment it is deemed to be an indictable offence and is treated accordingly.

This test is, in effect, procedural and dependent upon the election of the prosecution, subject to the approval of the court, or in certain cases upon the election of the accused. On the other hand the test contended for by the plaintiffs depends upon the nature and quality of the offence when committed, irrespective of the procedural manner in which it may subsequently be dealt with. I have come to the conclusion that the contention of the plaintiffs is to be preferred to that of the defendant, which was accepted by Oliver J. I think the reference in art. 26 to the Road Traffic Act, 1930, tends to support this view. There are five instances in that Act of cases where offences created by the act may be dealt with either summarily or on indictment, they are to be found in ss. 8, sub-s. 4, 11, 15, 28 and 112. I think the object of referring to this Act was to free the director from liability to loss of office on conviction for any one of these offences, irrespective of whether he happened to have been convicted by a court of summary jurisdiction or on indictment, on the basis that the offences created by the Act were by their nature indictable and therefore within the article unless expressly excluded. I realize, however, that on the defendant's interpretation summary convictions under these sections would be excluded in any event, and that it is said that the reference to the Act was merely to exclude convictions on indictment for the same offences. It would have been easy to say " convicted " on indictment " if that was what was really intended, and I think that for this reason Mr. Thesiger was compelled to concede that summary convictions for indictable offences triable summarily under the Criminal Justice Act, 1925, would be covered by the words "convicted of an indictable offence."

For these reasons, I would allow this appeal.

ASQUITH L.J. Sir Valentine Holmes in opening this appeal stated that it involved a very short point: What is meant by an "indictable offence" in art. 26? Strictly speaking, I think Mr. Thesiger defined the issue with exact precision when he said "What is meant by 'convicted of an indictable "'offence'"; since, theoretically at least, the meaning of "indictable offence" might have been affected (as indeed according to his argument it was affected) by the antecedent words, "convicted of." It may, however, be convenient to inquire first what "indictable offence" means without any antecedent words which might have a qualifying effect: and, secondly, whether the antecedent words make any difference.

Criminal offences or offences against public law—for such alone are here in question—fall into three categories for the present purpose: (1.) Offences in respect of which proceedings by indictment alone will lie; (2) offences in respect of which summary proceedings alone will lie; (3.) offences which can be proceeded against in either way according to the circumstances of the case: that is, the decision of the court with the consent of the accused, the election of the accused himself, or the election of the prosecution. If categories (1.) and (2.) alone existed, the case would present no difficulty. The difficulty only arises from the existence of category (3.). What offences fall within that third category? Here a sub-classification is necessary. The category splits into three sub-categories: (*a*) In some cases, a statute or regulation with statutory force provides (in effect) that an offence may be proceeded against either summarily or by indictment, at the election presumably of the prosecution. The Merchandise Marks Act, 1897, s. 2, sub-s. 3, and the Dentists' Acts, afford examples of such offences. (*b*) The second sub-category consists of cases falling within s. 17 of the Summary Jurisdiction Act, 1879, which provides that where the offence is such that the offender is liable on summary conviction to be imprisoned for more than three months, he may, before the charge has been gone into, claim to be tried by a jury on indictment, and that in that event the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence, and that the offence "shall be deemed to be" an indictable offence. (*c*) The third sub-category consists of offences specified in sch. II. to the Criminal Justice Act, 1925, and provided for by s. 24 thereof. These are offences which before that statute could be tried by indictment only. By s. 24 of that Act a person charged with such an offence may be dealt with summarily, provided (i.) that the court thinks this "expedient": (ii.) that the person charged, after being informed of his right to be tried by a jury on indictment, consents to be tried summarily. The heading of this section is "Summary trial of indictable offences," and there is more than one reference in its substantive provisions to "indictable "offences which are triable summarily." Schedule II. uses similar language.

The offence in the present case does not fall within sub-category (*c*). It is not in the schedule. It was not before the Act of 1925 triable on indictment only. Indeed it only came into existence in 1939. Nor again does it fall within sub-category (*b*), for it is not an offence which carries with it liability on summary conviction to a term of imprisonment for a period exceeding three months. It falls in fact within sub-category (*a*). If the words "convicted of" were absent from the material article—art. 26—of the company's articles of association—it would in my view be quite clear as a matter of plain grammar and English that the offence was an "indictable offence." An "indictable offence" without any qualifying context can mean nothing else but an offence in respect of which an indictment would lie: and the prosecution could clearly have had this particular offence tried by indictment, if it had chosen. It is none the less "indictable" because, if the prosecution chose, it could proceed in respect of it summarily. Neither the accused nor the bench in such a case has any option or election. This rests solely with the prosecution.

The substantial question is whether this position is affected by the antecedent words "Convicted of." Do these words compel this court to place itself, when inquiring whether the offence is "indictable," not at the point in time when the offence is committed, and when, accordingly, indictment is a possible way of proceeding in respect of it, but at a point of time where the prosecution have elected to proceed summarily, securing a conviction by that procedure. If as to the material time the latter alternative is right, then clearly at that time the offence has ceased to be, and is not, indictable, whatever it may have been earlier. In my view, the material time is the time when the offence was committed, and before the prosecution has elected to proceed summarily or secured a conviction on that basis. The framers of the article plainly meant this severe penalty to be reserved for offences of a certain degree of gravity. The measure of gravity is to be sought, in my opinion, in what *can* happen to persons guilty of that class of offence, not what *does* happen to the particular offender in the subsequent chapter of events as the result of the prosecution's choice to proceed in one way or another. The argument against this view could not have been more cogently presented than it was by Mr. Thesiger, but it involved refinements which I cannot believe entered into the purview or intention of the draftsman of the article. Counsel was driven to say that "indictable offences" included not only offences triable on indictment only, but also offences within sch. II. to, and s. 24 of, the Act of 1925 (viz., categories (*a*) plus (*c*)). He felt forced to do this because those provisions speak of the "summary "trial of indictable offences" and of "indictable offences "triable" (or which "may be dealt with") "summarily." But once it is admitted that an offence triable summarily can be described as an "indictable" offence, the logic of the defendant's case is undermined. It is simpler and more satisfactory to adhere to the plain grammatical meaning and to say that "convicted of an indictable offence" means convicted (by whatever tribunal) of an offence for which the offender could have been indicted. It would have been easy for the draftsman to have said "convicted on indictment" if that had been what he meant. He may have meant it, but he has not said so.

Some argument the other way has been founded on the exception, in art. 26, of offences under the Road Traffic Acts. But the exception cuts both ways. For some of those excepted offences are of the same order as that involved here, viz., offences which can at the sole option of the prosecution be proceeded against either summarily or by indictment (sub-category (*a*) above). An exception cannot be carved out of a class which does not prima facie include the thing excepted. You can say "all fruit except pears," but you cannot say "all apples except pears." Hence the class here involved ("indictable offences") includes offences such as the present, if sense is to be made of the exception. Whether on the view

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HASTINGS & FOLKESTONE GLASSWORKS LD. *v.* KALSON.

here propounded offences covered by s. 17 of the Summary Jurisdiction Act, 1879 (sub-category (*b*)) are "indictable "offences" is a question which may present some difficulty if and when it arises. Fortunately, in the present case, we are spared this complication. I agree with my Lord that the appeal should be allowed.

HARMAN J. Notwithstanding Mr. Thesiger's able argument I would allow this appeal. Articles in this form though not favoured in the best models have been a familiar feature of such things for many years, and I cannot bring myself to think that disqualification can depend on whether the offence in question is to be found in the schedule to an Act of 1925, or on the method by which the authorities choose to bring it home to the offender. In my judgment Mr. Thesiger's argument lays too much stress on the word "convicted." Of course it is a condition precedent to disqualification that there should have been a conviction; mere accusation may be wholly unjustified; but once a conviction has been recorded the test is the nature of the offence. Not every offence brings the sanction into effect; it must have been "indictable," and that in plain English means "for which an indictment lies." This offence satisfies that test, and the defendant's disqualification in my judgment follows.

Appeal allowed.
Declaration granted.
Injunction not granted.

Solicitors for plaintiffs: *Field, Roscoe & Co., agents for Herington, Willings & Penry-Davey, Hastings.*

Solicitors for defendant: *Menneer, Idle & Brackett, St. Leonards-on-Sea.*

A. W. G.

1948
Nov. 10, 11.

Birkett J.

EVON AND EVON *v.* NOBLE.

Evidence — Admissibility — Child injured — Action for negligence —Statement by nursemaid—"Persons interested"—Evidence Act, 1938 (1 *&* 2 *Geo.* 6. *c.* 28), *s.* 1, *sub-s.* 3.

A girl aged four was injured while playing with a rubber tube from a carboy of acid in a shed at the rear of a chemist's shop. A domestic servant employed by her parents had been placed in

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charge of their children (including the injured girl) on the day of the accident. The injured girl, by her father and next friend, and her father in his personal capacity, together brought an action for negligence against the chemist.

Held, that the nursemaid (who was not called to give viva voce evidence) was a " person interested " within the meaning of sub-s. 3 of s. 1 of the Evidence Act, 1938 inasmuch as the safety of the children was her peculiar care and her reputation was involved; and that a written statement made by her after the issue of the writ was therefore inadmissible in evidence under that section.

Action.

On May 7, 1946, the second plaintiff, a girl then aged four, was injured when playing with a rubber tube from a carboy of acid in a shed at the rear of a chemist's shop where the defendant carried on business. She, by her father and next friend, and her father in his personal capacity, together brought an action against the defendant chemist for negligence. The writ was issued on September 19, 1946.

The accident occurred in the mother's absence, a domestic servant (hereinafter referred to as the " nursemaid ") employed by the injured girl's parents having been told by the mother that day " to keep an eye on the children [including the injured " girl] and not to let them cross the road." The nursemaid made a written statement dated June 3, 1947, regarding relevant events within her knowledge which had occurred on that day, but she could not now be traced and called to give viva voce evidence although all reasonable efforts had been made to find her.

T. H. K. Berry for the plaintiffs applied at the trial of the action for that statement to be admitted in evidence under s. 1 of the Evidence Act, 1938—the statement is not rendered inadmissible by sub-s. 3 (1) of that section because the nursemaid was not " interested ; " she was a mere domestic.

[Birkett J. Morton J. laid down in *Plomien Fuel Economiser Co., Ld.* v. *National Marketing Co.* (2) that an employee might be a " person interested."]

Morton J. only said that an employee *might* be a " person

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(1) Evidence Act, 1938, s. 1, sub-s. 3 : " Nothing in this section " shall render admissible as evi- " dence any statement made by " a person interested at a time " when proceedings were pending " or anticipated involving a dis- " pute as to any fact which the " statement might tend to " establish."

(2) [1941] Ch. 248, 251.

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" interested." The nursemaid in the present case was not a " person interested " or, if she was, her degree of interest was so remote that she ought not be to included in the category of interested persons.

Flowers K.C. and *J. P. Webber* for the defendant opposed the application. The statement is rendered inadmissible by sub-s. 3 of s. 1 of the Evidence Act, 1938. The nursemaid was a " person interested " (i.) because her reputation as a nursemaid was involved and (ii.) because she was interested, as an employee, in her employers winning the case: *Barkway* v. *South Wales Transport Co., Ld.* (1).

Berry in reply. Asquith L.J. giving the judgment of the court in *Barkway* v. *South Wales Transport Co., Ld.* (1) did not intend to lay down a general principle that an employee, as an employee, was necessarily a " person interested." He expressly quoted, without any comment, as an authority on the matter, *Plomien Fuel Economiser Co., Ld.* v. *National Marketing Co.* (2) in which Morton J. said no more than that an employee might be a " person interested."

BIRKETT J. The immediate point is whether the statement which was made by the nursemaid on June 3, 1947, ought to be admitted as evidence in this action under s. 1 of the Evidence Act, 1938, having regard to the terms of sub-s. 3 of that section. It is agreed that that statement was made when proceedings were actually pending. The writ had been issued. The question therefore which I have to decide is whether the nursemaid was a person interested. The number of authorities upon that matter is now beginning to grow, but no comprehensive category of persons " interested " within the meaning of sub-s. 3 has yet been made. It has been said that certain persons are clearly not interested and that certain persons are. In *Bain* v. *Moss Hutchison Line, Ld.* (3) I decided the question whether certain persons were so " interested " on the special facts of that case. In the course of my judgment I referred to the observations of Morton J. in *Plomien Fuel Economiser Co., Ld.* v. *National Marketing Co.* (2) where he said: " It may be " that there are circumstances in which it might be said that " a servant of the company was not ' a person interested ' "— Note that he used the word " might "—" As to that, I express " no opinion ; but I think that the general intention of the " section is that, if there is put in evidence a statement to

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(1) Ante, p. 54.

(2) [1941] Ch. 248, 251.

(3) Ante p. 51.

"which, of course, no cross-examination can be directed, "it should be either one made at a time when proceedings "'involving a dispute as to any fact which the statement "'might tend to establish' are not 'pending or anticipated,' "or one made by what I may perhaps conveniently describe "as an independent person." That reasoning commends itself to me because cross-examination is one of the great virtues of our legal system. If a party to a dispute is to have a statement, to which no cross-examination can be directed, adduced in evidence against him, that party obviously labours under a great disability, and one must always therefore keep in mind the fact that if a statement is admitted under s. 1 of the Evidence Act it is a statement to which there can be no cross-examination. It is imperative therefore that if such a statement is admitted it should have been made by an "independent" person in the ordinary sense of the word. An "independent" person in that sense means a person who has no temptation to depart from the truth on one side or the other, a person not swayed by personal interest, but completely detached, judicial, impartial, independent.

In *Holton* v. *Holton* (1) counsel made a submission to the judge, who appears to have adopted it without giving any further comment. The submission was (2) that the words "person interested" must mean "a person who has a pecuniary "or other material interest in the result of the proceedings— "a person whose interest is affected by the result of the "proceedings, and, therefore, would have a temptation to "pervert the truth to serve his personal or private ends. "It does not mean an interest in the sense of intellectual "observation or an interest purely due to sympathy. It means "an interest in the legal sense, which imports something to be "gained or lost."

Mr. Flowers drew my attention to *Barkway* v. *South Wales Transport Co., Ld.* (3). An action arising out of a road accident, which was caused by a tyre burst, was brought for negligence against the defendants and a tyre-tester and fitter employed by them gave evidence on their behalf. Subsequently another action was brought for negligence against them but in the meantime the tyre-tester had died. References were made in the second trial to what the tyre-tester had said in the first but there was no formal application then to use his evidence. When the second case came to the Court of Appeal it was

(1) [1946] 2 All E. R. 534.

(2) Ibid. 535.

(3) Ante p. 54.

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sought to use the transcript of the evidence of the tyre-tester in the first action as evidence in the appeal. In giving the judgment of the court on that issue Asquith L.J. considered a number of points under the Evidence Act and said (1) that the tyre-tester was clearly a " person interested " within the meaning of s. 1, sub-s. 3. He continued : " His " reputation as a tyre-tester was involved, and, apart from that, " he was interested, as an employee, in his employers winning " the case " see *Plomien Fuel Economiser Co., Ld.* v. *National Marketing Co.* (2).

The nursemaid who made the statement in the present case was in charge of the children, in the absence of their mother, on the day of the accident. What I have to ask myself is : " In all the circumstances of this case was she a person " interested ? " She was not financially interested. She may have had the interest of sympathy, but that does not affect me in my decision. I think that she was, in the true sense of the words, a " person interested." She had been left in charge of the injured girl. The girl had come to injury, and I think that the nursemaid's reputation for minding children was in issue, just as the tyre-tester's reputation was in issue in *Barkway's* case (3). It might be asked " What " was the nursemaid doing to leave the injured girl so that " she could get into this difficulty and danger ? " And, of course, the nursemaid was a servant in the employment of the plaintiffs, and according to the judgment of the Court of Appeal in *Barkway's* case (3) that is one of the grounds upon which a person may be " interested." Morton J. has, however, said, in effect, in *Plomien Fuel Economiser Co., Ld.* v. *National Marketing Co.* (4) that it may very well be that a servant is not a person interested. The ground upon which I put my decision is that the nursemaid was a person interested in the sense that she had been left in charge of these children. Their safety was her peculiar care, and in that sense her reputation was involved in the result of the action. In all the circumstances therefore I shall not admit this statement.

Evidence rejected.

Solicitors for plaintiffs : *B. Elliston & Co., for Elliston Flint & Co., Southend-on-Sea.*

Solicitors for defendant : *Sprinz & Sons, for Thurlow Baker & Nolan, Southend-on-Sea.*

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(1) Ante p. 61.

(2) [1941] Ch. 248.

(3) Ante p. 54.

(4) [1941] Ch. 248, 251.

R. P. C.

pplied. ~~Falmouth Boat Con-~~
~~ruction, Ld. v. Howell. [1950]~~
~~All E.R. 538.~~

Followed. Falmouth ~~Boat Construction~~
~~Co., Ld. v. Howell~~
[1950] 2 K. B. 16

Observations of Denning, J., at p. 230, *applied.* Combe v. Combe. [1950] 2 All E.R. 1115.

Considered. Combe v. Combe [1951] 2 K. B. 215

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ROBERTSON *v.* MINISTER OF PENSIONS.

1948
Oct. 5, 11.

Denning J.

Estoppel—Promise intended to be acted upon—Crown—Different departments—Assurance in War Office letter—Whether Minister of Pensions bound.

The appellant, a serving army officer, wrote to the War Office regarding a disability of his and received a reply, dated April 8, 1941, stating: "Your disability has been accepted as attributable "to military service." Relying on that assurance he forebore to obtain an independent medical opinion on his own behalf. The Minister of Pensions later decided that the appellant's disability was not attributable to war service.

Held (i.) that as between subjects such an assurance would be [illegible] ~~enforceable~~ because it was intended to be binding, intended to be acted upon, and was in fact acted upon; (ii.) that the assurance was binding on the Crown because no term could be implied that the Crown was at liberty to revoke it; and (iii.) that the assurance was therefore binding on the Minister of Pensions, the appellant having become entitled to assume that the War Office had consulted any other departments concerned before it gave the assurance.

Central London Property Trust Ld. v. *High Trees House Ld.* [1947] K. B. 130 followed.

Rederiaktiebolaget Amphitrite v. *The King* [1921] 3 K. B. 500 distinguished.

PENSIONS APPEAL.

The appellant served throughout the 1914–18 war and for six years in the 1939–45 war. Between the wars he served in the Territorial army. He was injured in a train accident in 1927. He had a stiff neck and some neuritis but this cleared up by 1928. Thereafter he played rugby football and led an energetic life with no further trouble. In December, 1939, while on military service, he fell, receiving a severe blow on the chin, and injured himself. The injury was very painful and left persistent stiffness. He was X-rayed at Millbank Hospital in May, 1940. The diagnosis was prolapsed intervertebral discs. In July, 1940, a medical board found him unfit for general service and he was put permanently in category B.

In March, 1941, the appellant, then a colonel, wrote to the Director of Personal Services at the War Office sending him a full statement regarding his case and stating: "On July 3, "1940, I was examined at Millbank by a medical board which "reported me permanently unfit for general service and placed "me in category B. I understand that no report was made on "the question of attributability and I should be glad if this "matter can now be considered." On April 8, 1941, the Director of Personal Services replied: "Dear Colonel, You wrote me on "March 11 regarding the injury you sustained in December "1939; and I now write to let you know that *your case has "been duly considered and your disability has been accepted as "attributable to military service.* I am pleased the question "has been settled in such a satisfactory manner." It appeared from the War Office file that that letter had been written after careful consideration by all the departments of the War Office concerned, but that neither the Minister of Pensions nor anyone in his department had been consulted. Relying on the assurance in that letter, the appellant took no steps at the time, as he would otherwise have done, to obtain an independent medical opinion on his own behalf. X-ray plates which were then available and which showed the extent of his injuries had since been lost or destroyed.

The Minister of Pensions later decided that the appellant's disability was not attributable to war service, and the pensions appeal tribunal affirmed that decision. The appellant appealed on the ground that the Minister of Pensions was bound by the assurance in the War Office letter of April 8, 1941.

Crispin for the appellant. The War Office letter of April 8, 1941, estopped the Minister of Pensions from denying that the appellant's disability was attributable to war service.

[DENNING J. Was the question of attributability a question of law or a question of fact?]

It was a mixed question of law and fact.

[DENNING J. How can the Minister of Pensions be bound by a letter from the War Office?]

The letter binds the Crown, therefore it binds the Minister of Pensions who is a servant of the Crown.

H. L. Parker for the Minister of Pensions. It cannot be said that the appellant, relying on the War Office letter, acted to his detriment. The Director of Personal Services was not held out by the War Office as the appropriate authority for administering the Royal Warrants concerning pensions. His letter did not therefore estop the Crown. It followed that it did not estop the Minister of Pensions.

Crispin in reply. The appellant acted to his detriment by forbearing to get an independent medical opinion. He could not, at the time of the War Office letter (April 8, 1941), contract with the Minister of Pensions because he was still a serving soldier.

Cur. adv. vult.

Oct. 11. DENNING J. The facts gave rise to three possible interpretations: (1.) The disability may have been due to the first injury in 1927 which took a long time to manifest itself. It would then not be due to war service. (2.) The first injury may have cleared up, or at any rate, left only a condition which might never have given any trouble but for the second accident in 1939. The disability would then be due to the second injury which was attributable to war service. (3.) The first accident may have given rise to an injurious process which would, sooner or later, have given rise to the disability in greater or less degree but was accelerated or intensified by the second accident. The disability would then be due to the first injury, though aggravated by the second. In that case, so long as aggravation remained, the disability would be due to war service. It is plain that for the determination of those nice questions a sight of the X-rays would be most important.

Neither the Minister of Pensions, nor anyone in his department was consulted before the War Office letter of April 8, 1941, was written. But if that letter was to have any effect at all, it would have to be binding on the Minister of Pensions, because the Royal Warrant of September 15, 1939, had transferred to him the entire administration of disablement claims in respect of service after September 2, 1939. The War Office still retained jurisdiction over claims in respect of service before September 3, 1939; and that is a jurisdiction which they still retain under art. 653 of the Royal Warrant for Pay of February 29, 1940. The appellant's claim was however clearly a claim in respect of his injury of December, 1939, and so came within the Royal Warrants in respect of service in the 1939 world war. The important thing to notice is that the letter of April 8, 1941, is framed in the very words of the Royal Warrant of June, 1940 (1), which was then in force.

(1) The Royal Warrant of June 29, 1940, provided: "2.—" For the purposes of this our "Warrant the following expressions shall, unless a contrary "intention appears, have the "meanings stated below :— . . . . "(4.) '*Certified*' shall mean, in "respect of any medical certification, certified by a medical "officer or board of medical "officers appointed or recognized "for the purpose by the Minister "[of Pensions]; . . . ."

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Article 5 of that warrant lays down the condition under which "a disability" shall or shall not be "accepted as attributable "to military service." That warrant dealt with all claims in respect of war injuries, that is, pensions, retired disability pay, allowances and medical expenses. The assurance was given to the appellant in these explicit words: "Your disability "has been accepted as attributable to military service." That was, on the face of it, an authoritative decision intended to be binding and intended to be acted on. Even if the appellant had studied the Royal Warrant in every detail there would have been nothing to lead him to suppose that the decision was not authoritative. He might well presume that the army medical board was recognized by the Minister of Pensions for the purpose of certifying his disability to be attributable to military service under the Royal Warrant of June, 1940: and that their certificate of attributability was sufficient for the purpose of the warrant.

What then is the result in law? If this was a question between subjects, a person who gave such an assurance as that contained in the War Office letter would be held bound by it unless he could show that it was made under the influence of a mistake or induced by a misrepresentation or the like. No such defence is made here. There are many cases in the books which establish that an unequivocal acceptance of liability will be enforced if it is intended to be binding, intended to be acted on, and is in fact acted on. I may instance the cases under the Workmen's Compensation Acts, the latest of which is *Birch* v. *Pease & Partners* (1). Those cases are often not cases of estoppel in the strict sense, because estoppel strictly

"4. *Conditions for disability* "*awards.*—A member of the military forces whose services have been terminated on account of medical unfitness or for other reasons, and who is then or later certified to be disabled in consequence of a disability attributable to military service during the war, may be granted a disability award, subject to ". . . . ."

"5. *Meaning of attributable disability.*—(1.) A disability shall not be accepted as attributable to military service for the purpose of this our Warrant unless it is certified to be:

"(*a*) directly attributable to military service during the war, or

"(*b*) due to a wound, injury, or disease which:—(i.) arose during war service or existed before such service, and (ii.) was aggravated by war service to a material extent and remains so aggravated."

(1) [1941] 1 K. B. 615.

only applies to representations of fact, not of law. Here all the primary facts were known to both parties: and the only question was, what was the proper conclusion to be drawn from them. Furthermore, the cases are often not cases of simple contract because, unlike a compromise, there is no consideration given at the time. Thus, we have here no promise, express or implied, by the appellant to forbear from obtaining a medical opinion. Yet, if his disability had not been accepted as attributable to military service, he would have obtained one. He did, therefore, on the faith of the War Office letter, forbear from getting such an opinion. That is sufficient to make the letter binding. The case falls within the principle that if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it is given, then, once it is acted upon, he is bound by it. See *Central London Property Trust Ld.* v. *High Trees House Ld.* (1) and *Bob Guiness, Ld.* v. *Salomonsen* (2).

The next question is whether the assurance in the War Office letter is binding on the Crown. The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, that is, the doctrine that the Crown cannot bind itself so as to fetter its future executive action. That doctrine was propounded by Rowlatt J. in *Rederiaktiebolaget Amphitrite* v. *The King* (3), but it was unnecessary for the decision because the statement there was not a promise which was intended to be binding but only an expression of intention. Rowlatt J. seems to have been influenced by the cases on the right of the Crown to dismiss its servants at pleasure, but those cases must now all be read in the light of the judgment of Lord Atkin in *Reilly* v. *The King* (4). That judgment shows that, in regard to contracts of service, the Crown is bound by its express promises as much as any subject. The cases where it has been held entitled to dismiss at pleasure are based on an implied term which cannot, of course, exist where there is an express term dealing with the matter. In my opinion the defence of executive necessity is of limited scope. It only avails the Crown where there is an implied term to that effect or that is the true meaning of the contract. It certainly has no application in this case. The War Office letter is clear and explicit and I see no room for implying a term that the

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(1) [1947] K. B. 130.
(2) [1948] 2 K. B. 42, 47, 48.
(3) [1921] 3 K. B. 500, 503, 504.
(4) [1934] A. C. 176, 179.

Crown is to be at liberty to revoke the decision at its pleasure and without cause.

I come therefore to the most difficult question in the case. Is the Minister of Pensions bound by the War Office letter? I think he is. The appellant thought, no doubt, that, as he was serving in the army, his claim to attributability would be dealt with by or through the War Office. So he wrote to the War Office. The War Office did not refer him to the Minister of Pensions. They assumed authority over the matter and assured the appellant that his disability had been accepted as attributable to military service. He was entitled to assume that they had consulted any other departments that might be concerned, such as the Ministry of Pensions, before they gave him the assurance. He was entitled to assume that the board of medical officers who examined him were recognized by the Minister of Pensions for the purpose of giving certificates as to attributability. Can it be seriously suggested that, having got that assurance, he was not entitled to rely on it? In my opinion if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it binds the Crown also; and as the Crown is bound, so are the other departments, for they also are but agents of the Crown. The War Office letter therefore binds the Crown, and, through the Crown, it binds the Minister of Pensions. The function of the Minister of Pensions is to administer the Royal Warrant issued by the Crown, and he must so administer it as to honour all assurances given by or on behalf of the Crown.

In my opinion therefore the finding of the tribunal that the disability was not attributable to war service must be set aside. The War Office letter is binding on the Minister of Pensions and he is bound to accept the disability as "attributable to military "service" for the purposes of the Royal Warrant of 1940, that is as "due to war service" for the purposes of the Royal Warrant of 1946 (1). The Minister is, therefore, bound to

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(1) Article 3 of the Royal Warrant of April 12, 1946, provides: "*Basic condition of awards.* "—Under this our Warrant awards ". . . . may be made where the "disablement or death of a "member of the military forces "is due to war service."

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[illegible]

concede that, of the three interpretations I mentioned at the beginning, either (2.) or (3.) applies: and, if there is a reasonable doubt as to which of these, the benefit must be given to the appellant. Of these two, interpretation (2.) was the interpretation intended by the War Office and is plainly the right interpretation. This appeal is therefore allowed. An award must issue that the appellant's disability is due to the injury of December, 1939, which was attributable to war service.

Appeal allowed.

Solicitors for appellant: *Culross & Trelawny.*
Solicitor for respondent: *The Treasury Solicitor.*

R. P. C.

HUNT *v.* MORGAN.

1948
Nov. 22, 23
Dec. 1.

Lord Goddard C.J., Hilbery and Birkett JJ.

Hackney carriage—Metropolitan police district—Taxi-cab—" Plying for " hire "—Refusal to accept passenger while cab in motion—Duty to accept when cab on rank or stationary in road—Hackney Carriages (London) Act, 1853 (16 & 17 Vict., c. 33), ss. 7, 17, sub-s. 2.

The driver of a taxi-cab which is travelling along the road is not " plying for hire at any place " within the meaning of s. 7 of the Hackney Carriages (London) Act, 1853, and commits no offence under s. 17, sub-s. 2, if he refuses to accept as a passenger one who desires to hire his cab: a driver can only be required to accept as a fare a person desiring to hire his cab when it is actually standing on a rank or stationary in a street.

CASE STATED by County of London Quarter Sessions.

C. A. Hunt, a taxi-cab driver, the appellant in the present appeal, appealed to quarter sessions against his conviction by a metropolitan police magistrate on a charge preferred against him by the respondent under s. 17, sub-s. 2, of the Hackney Carriages (London) Act, 1853 (1).

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(1) Hackney Carriages (London) Act, 1853, s. 7: " The driver " of every hackney carriage which " shall ply for hire at any place " within the limits of this Act " shall (unless such driver have a " reasonable excuse, to be allowed " by the justice before whom the " matter shall be brought in " question) drive such hackney " carriage to any place to which he " shall be required by the hirer

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At the hearing before quarter sessions the following facts were proved or admitted. On July 8, 1947, at 1 a.m., the appellant was driving his cab along Vauxhall Bridge Road and from thence into Victoria Street. The cab was not already hired and the flag was in the " for hire " position and was not covered. A man, who was standing on a road island in Victoria Street, near the junction of that street and Vauxhall Bridge Road, made clear signals to the appellant and shouted, indicating that he desired to hire the appellant's taxi-cab. The appellant did not stop although he realized that the man wished to hire his cab, his reason for refusing to stop being that in his opinion the intending passenger was under the influence of drink. The appellant was charged " for that he, on July 8, 1947, at Victoria Street, being the " driver of a motor hackney carriage, No. 9910 did unlawfully " refuse to drive the said carriage to a place within the limits " of the Hackney Carriages (London) Act, 1853, not exceeding " six miles to which he was required to drive by a person " intending to hire such carriage, contrary to s. 17, sub-s. 2, " of the Hackney Carriages (London) Act, 1853." The magistrate convicted the appellant and imposed a fine of ten shillings.

On the appeal to quarter sessions it was contended for the appellant that a taxi-cab driver who is driving an unhired cab in a public place with the flag of the taximeter in the " for hire " position, is not necessarily plying for hire and is not bound to stop or accept a hiring from a person wishing to hire the taxi-cab, and that on the facts the appellant had a reasonable excuse for refusing to be hired by the intending passenger.

For the respondent it was contended that the appellant's taxi-cab was in a public place with the flag in the " for hire " position and was, therefore, deemed to be plying for hire; that on the facts the intending passenger was not drunk or under the influence of drink and that even if the appellant

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" thereof to drive the same, not " exceeding six miles from the " place where the same shall have " been hired . . . ."

S. 17: . . . . " the driver of any " hackney carriage, who shall " . . . . commit any of the following offences within the limits of " this Act, shall be liable to a " penalty . . . . ".

Sub-s. 2: " Every driver of " a hackney carriage who shall " refuse to drive such carriage to " any place within the limits of " this Act, not exceeding six miles, " to which he shall be required to " drive any person hiring or " intending to hire such carriage " . . . ."

thought he was, it was unreasonable for him to form that view without stopping and that, consequently, the appellant had no reasonable excuse for refusing to accept the fare.

Quarter sessions found that the appellant refused to drive his carriage to a place within the limits of the Hackney Carriages (London) Act, 1853, not exceeding six miles, to which he was required to drive by the intending passenger; that the view formed by the appellant that the passenger was under the influence of drink was inaccurate and unreasonable and that there was, therefore, no reasonable excuse for the appellant's refusal to stop. They accordingly dismissed the appeal and increased the penalty imposed to twenty shillings.

W. D. Collard and *J. W. Borders* for the appellant. No offence was committed by the appellant in this case. Section 7 of the Hackney Carriages (London) Act, 1853, requires that the driver of the carriage must be plying for hire within the limits of the Act before the offence created by s. 17, sub-s. 2, can be committed. It is submitted that there can be no "plying for hire" unless the cab is stationary at a cab rank.

[LORD GODDARD C.J.: A stage carriage is plying for hire when it is going along a road.]

There is no case in which it has been held that a moving taxi-cab is plying for hire, and a consideration of the sections of the various hackney carriage Acts shows that the contention put forward on behalf of the appellant is correct. By s. 21 of the Act of 1853, that Act is to be construed as one with the Act of 1843 and the latter Act by s. 43 provides that "Every "driver of a hackney carriage who shall ply for hire elsewhere "than at some standing place or place appointed for that pur-"pose" commits an offence; clearly indicating that the only lawful way of plying for hire is at a standing place. This view is fortified by s. 2 of the same Act which defines hackney carriage as including "every carriage which shall stand on "hire or ply for hire at any place within the limits of the City "of London." Again by s. 35 of the Act of 1831 which is incorporated by the Act of 1843, "every hackney carriage "which shall be found standing in any street or place . . . . "shall, unless actually hired, be deemed to be plying for hire" and s. 37 shows the distinction between "standing" and "plying" on the one hand and "driving" on the other. In the Law of Cabs in London by Herman Cohen, it is stated that "the law only contemplates cabs plying for hire by standing "and waiting at certain defined places."

[HILBERY J. Section 7 of the Act of 1853 makes it an offence to ply for hire at any place within the limits of the Act.]

Reliance is placed on the word "at" any place as indicating a fixed position. It is not possible under the Acts to ply for hire except from a fixed position and if a driver solicits hire while his cab is in motion he commits an offence. In the Shorter Oxford Dictionary, in relation to a boatman, porter, cabman, omnibus, taxi, etc., ply is defined as meaning "to "attend regularly, to have one's stand *at* a certain place for "hire or custom." As the appellant in the present case was not "plying" when the intending passenger desired to hire him, he committed no offence in refusing to drive him. [They referred to *Sales* v. *Lake* (1).]

F. H. Cassels for the respondent. The appellant was properly convicted of the offence with which he was charged, since, a driver may ply for hire within the meaning of s. 7 of the Act of 1853 at places other than fixed stands. Section 12 empowers the commissioners of police to appoint men to enforce good order "at the standings for hackney carriages "and at the places at which" they "shall call or ply for "passengers," indicating that they can ply at other places than stands, while s. 7 itself speaks of plying "at any place "within the limits of this Act." If the Act had intended that a driver should "ply" only at a standing, it would have said so.

[LORD GODDARD C.J. Section 7 has to be incorporated into s. 17, sub-s. 2 and, to prove that an offence has been committed, it must be shown that it was committed at a place within the limits of the Act.]

Neither s. 7 nor s. 17 refers to any particular place such as a standing place or anything of that kind. In the present case the appellant was plying for hire and without any reasonable excuse, as quarter sessions found, he refused to carry a passenger. He was, therefore, rightly convicted.

Collard in reply.

Cur. adv. vult.

Dec. 1. The judgment of the court was read by LORD GODDARD C.J.

The question raised in this case is whether a cruising taxi-cab

(1) [1922] 1 K. B. 553.

is bound to accept anyone who hails it. It is obviously one of general importance not only to cab-drivers but to the members of the public, and seems never to have been the subject of a decision. There is no doubt a widely held belief that a cabman, whether on the rank or not, is bound to accept a fare unless he has a reasonable excuse for refusing, and a full examination of the statutes relating to hackney carriages in London is necessary to decide whether this belief, which at any rate accords with the opinion both of the magistrate and the appeal committee, is well founded.

The first Act dealing with hackney carriages in London to which it is necessary to refer is an Act of 1831, to amend the Laws relating to Hackney Carriages, and other conveyances (1 & 2 Will. 4, c. 22). By s. 34 of that Act is was provided "that the driver of every hackney carriage which shall be let "for hire at any place within the distance of five miles from the "General Post Office in the City of London shall be obliged and "compellable, if required by any person hiring such hackney "carriage (unless such driver shall have a reasonable excuse to "be allowed by the justice) . . . . , to drive such hackney "carriage to any place to which he shall be so required to drive "within the distance of five miles . . . ." That Act repealed a very large number of old statutes which dealt with hackney carriages and coaches in London as well as other means of transport. In the Act, no reference is made to standing places or, as they are commonly called, cab ranks. A reference to contemporary literature will, however, show that unofficial cab ranks did exist in London at that time, as it may be remembered that Mr. Pickwick on May 13, 1827, set out for the Golden Cross in a cab which was the first one on the rank at St. Martins-le-Grand in order to get the coach for Rochester, but we have not been able to find any Act regulating or setting up cab ranks before the Act of 1843 (6 & 7 Vict., c. 86). Section 29 of that Act provided that "it shall be lawful for the "Commissioners of Police . . . . to appoint standings for "hackney carriages at such places as they shall think con-"venient within the Metropolitan Police District . . . . and ". . . . to make regulations concerning . . . ." them, and s. 33 provided "that every driver of a hackney carriage who "shall ply for hire elsewhere than at some standing or place "appointed for that purpose, or who by loitering . . . . shall "cause any obstruction in or upon any public street . . . ." shall be guilty of an offence.

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HUNT v. MORGAN.

It may be observed that in this Act, as in another Act dealing with the subject, it seems as though to stand and to ply for hire are used as interchangeable terms meaning the same thing. For instance, in s. 31 it is provided that nothing in the Act shall authorize any cab (which is the expression, for brevity, we shall use throughout to describe a hackney carriage) to stand or ply for hire opposite to the General Post Office in St. Martins-le-Grand, where, obviously, from the reference in Pickwick, there used to be a rank. Section 33, it will be seen from the reference above. forbids a cabman to ply for hire otherwise than at a standing, so clearly for the purpose of the Act the word " ply " does not connote motion, as in common parlance it often does, e.g., if one speaks of a vehicle or ferry-boat plying between certain points.

We now turn to the Act of 1853. The appellant was summoned under s. 17, sub-s. 2 of that Act, but, of course, one must turn back to s. 7, which is the section which imposes the duty on the driver and provides him with the defence of a reasonable excuse.

Now the real question in this case is, what do the words in s. 7, " which shall ply for hire at any place within the limits " of this Act," mean ? Have they got the popular meaning which would certainly include a cab driving down a street with the flag up on which the words " for hire " appear, or must they be confined to the cabman on the rank ? In our opinion, with one exception which we will mention hereafter, it is only the cabman on the rank who is obliged to accept a fare. The plying for hire referred to in s. 7, which is the material section must, we think, be so confined. It refers to the driver of every cab which shall ply for hire at any *place*, within the limits of the Act and that must, in our opinion, refer to a place appointed for the standing of hackney carriages under the Act of 1843, which is to be read together with and as part of the Act of 1853. " Place " must mean a definite point, just as the same word later in the section clearly refers to a definite destination to which the driver is required to go. It cannot mean " anywhere in a street." This view is reinforced by the fact that it is actually made an offence for a cab driver to ply for hire elsewhere than at one of those places. No doubt the cabman who has set down a fare and is proceeding to one of those places can accept a fare if he is hailed, and it could not, we think, be held, unless he was soliciting fares as he drove along the street, that he was committing an offence against s. 33 of the Act of 1843.

That it is the standing cab and not the moving cab that must accept a fare seems to be shown also by s. 35 of the Act of 1831. As we have already said, that Act contained no provision with regard to cab ranks or standing places, but it does provide that every cab found standing in any street or place shall, unless actually hired, be deemed to be plying for hire, although such cab shall not be on any standing or place usually appropriated for the purpose of cabs standing or plying for hire, unless it is actually hired at a time when some person wishes to be driven in it. The onus of proving that he was actually hired at the time of his refusal is laid on the driver. This section is unrepealed, and it would therefore appear that if a cab is standing in the street having, for instance, just set down a passenger, the driver is bound to accept as a fare any person who desires to be driven, provided that person so informs the driver while he is still stationary and unengaged. At any rate, it seems to us clear that a cab driver commits no offence under the Act of 1853 by refusing to stop when hailed, and that he can only be required to accept anyone who chooses to hire him when he is actually on a rank or is stationary in a street.

It may not be inappropriate to hope that this matter will receive the attention of the appropriate authority which, in relation to cabs, is the Home Secretary. Conditions in 1948 are very different from what they were in 1853, when taxi-cabs were unknown. At present, every taxi-cab which is not actually hired must be driven with the flag of the taximeter in the upward position, and the words " for hire " appear on it. Modern taxi-cabs are now fitted with devices illuminated at night which show on the front of the roof the words " taxi " or " for hire," and the public may well believe that under those circumstances it is open to them to demand to be driven in any cab which is not actually conveying a passenger. It is evident that in the middle of the last century when all cabs were horse-drawn, the legislature desired to discourage the dawdling cab, which might easily cause obstruction in the street, for the horse would naturally be allowed to proceed at a walking pace if the cab was not actually hired. Therefore, it may well have seemed to the legislature in those days that it was desirable as far as possible to ensure that the hiring of cabs should take place at recognized ranks and not casually in the streets. Under modern conditions, the cruising taxi-cab is one of the commonest sights in London streets. We have, however, to deal with the law as it stands and must see that the existing statutes are not strained so as to make a man guilty of an offence unless the words of the section clearly apply to his case. A full consideration of those sections shows that the expression "Like the cabman on the rank," so often applied with regard to people bound to accept employment if offered, for instance, members of the Bar, is well founded. It is also to be remembered that there are no fewer than six Acts on the statute book dealing with cabs in London, Acts of 1831, 1843, 1850, 1853, 1869 and 1907. Some of the sections in these numerous statutes are obsolete, many are obscure as may be seen from the judgment of this court in *Goodman* v. *Serle* (1) and others, as this case shows, are out of date. It is, therefore, not surprising that cab drivers, the police and magistrates, to say nothing of the general public, have difficulty in ascertaining the law on this subject and make mistakes about it. It would seem that an Act consolidating and amending and, if possible, simplifying the law with regard to cabs, is very desirable.

The appeal is allowed with costs here and before the Appeal Committee.

Appeal allowed.

Solicitors for the appellant: *Seifert, Sedley & Co.*

Solicitor for the respondent: *Solicitor for the Metropolitan Police.*

(1) [1947] K. B. 808.

P. B. D.

1948
Oct. 22.

Humphreys, Lynskey and Byrne JJ.

S. STONE AND SONS (HOUNSLOW) LIMITED *v.* PUGH.

Food and drugs—Sausage meat—Deficiency in meat content—Procedure with regard to samples—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 70, *sub-ss.* 1, 2.

Where an article of food is "purchased" at the premises of the consignee for the purpose of analysis under s. 70 of the Food and Drugs Act, 1938, and no name and address of the consignor appear on the article or its container, it must be dealt with by the sampling officer in accordance with s. 70, sub-s. 1, except that the part of the sample therein first mentioned is to be retained by that officer.

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Case stated by Middlesex justices.

Informations were preferred by the respondent against the appellants, a company carrying on business as retail butchers at Harrow, charging them with supplying beef sausage meat and beef sausages deficient in meat content, contrary to s. 3 of the Food and Drugs Act, 1938 (1). At the hearing of the informations the following facts were proved or admitted: On January 28, 1948, the appellants supplied Redhill county hospital with 100 lb. of beef sausage meat, 50 lb. of beef sausage meat and 4 lb. of beef sausages. The delivery was made by van, and the driver of the van carried the consignment on metal trays into the hospital store. The appellants' name and address did not appear on the metal trays. When the van had left, a sampling officer employed by the Middlesex

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(1) Food and Drugs Act, 1938, s. 3, sub-s. 1: "If a person sells "to the prejudice of the purchaser "any food or drug which is not of "the nature, or not of the "substance, or not of the quality, "of the food .... demanded by the "purchaser, he shall, subject to "the provisions of the next "succeeding section, be guilty of "an offence."

Subsection 2: "Where "regulations made under this "Act contain provisions pre-"scribing the composition of ".... any food, a purchaser of "that food shall .... be deemed "for the purposes of this section "to have demanded food comply-"ing with the provisions of the "regulations."

Section 70, sub-s. 1: "A person "purchasing a sample of any "food .... with the intention of "submitting it to be analysed "by a public analyst, or taking a "sample of food on any premises "with the intention of submitting "it to be so analysed, shall, after "the purchase has been completed "or the sample has been taken, "forthwith inform the seller or "his agent who sold the sample ".... of his intention to have the "sample analysed by the public "analyst, and shall then and there "divide it into three parts .... "and shall—(*a*) if required so to "do, deliver one part to the seller "or his agent ....; (*b*) retain "one part for future comparison; "and (*c*) if he thinks fit to have an "analysis made, submit one part "to the public analyst: .... "Provided that, in relation to "samples taken in such circum-"stances as are mentioned in "either of the two next succeeding "subsections, the foregoing pro-"visions with respect to the "giving of information and the "manner of dealing with samples "shall have effect as modified by "those subsections."

Subsection 2: "A person taking "a sample of any food while it is in "transit or at the place of delivery "to the purchaser, consignee or "consumer shall, if he intends to "submit it to be analysed by a "public analyst, deal with it in "the manner provided by the "preceding subsection, except "that he shall retain the first-"mentioned part of the sample "unless the name and address of "the consignor appear on the "container containing the article

County Council took samples of the sausage meat and sausages. In compliance with s. 70 of the Food and Drugs Act, 1938, he divided each sample into three portions and placed each portion in a jar. Later the same day one part of each of the samples was delivered by the sampling officer to the public analyst. The sampling officer did not forward parts of the samples to the appellants, nor did he inform them of his intention to have the samples analysed by the public analyst. On February 27, 1948 the sampling officer informed the appellants' manager of the deficiencies in meat in each of the samples. On March 24, 1948, the appellants' solicitor wrote to the prosecutor requesting that one part of each of the samples should be delivered to his clients or to himself, pursuant to s. 70 of the Act. On March 30, 1948, the prosecutor replied that he was unable to comply with the request, since the name and address of the appellants did not appear on the containers and that he was required to retain the portions of the samples under s. 70, sub-s. 2, of the Act of 1938.

" sampled, in which case he shall " forward that part of the sample " to the consignor by registered " post or otherwise, together with " a notice informing that person " that he intends to have part of " the sample analysed by the " public analyst."

Section 80, sub-s. 4 : " In any " proceedings under this Act, " where a sample has been procured in such circumstances that " its division into parts is required " by this Act, the part of the " sample retained by the person " who procured it shall be produced at the hearing."

Section 81, sub-s. 1 : " In any " proceedings under this Act, " the production by one of the " parties of a document purporting to be a certificate of a public " analyst in the prescribed form, " or of a document supplied to him " by the other party as being a " copy of such a certificate, shall " be sufficient evidence of the facts " stated therein, unless, in the " first-mentioned case, the other " party requires that the analyst " shall be called as a witness."

Section 83, sub-s. 1 : " A person " against whom proceedings are " brought under this Act shall, " upon information duly laid by " him and on giving to the prosecution not less than three clear " days' notice of his intention, " be entitled to have any person " to whose act of default he " alleges that the contravention " of the provisions in question " was due brought before the " court in the proceedings, " and, if, after the contravention " has been proved, the original " defendant proves that the contravention was due to the act " or default of that other person, " that other person may be convicted of the offence, and, if the " original defendant further proves " that he has used all due diligence " to secure that the provisions in " question were complied with, " he shall be acquitted of the " offence."

No request was made on behalf of the appellants for portions of the samples to be analysed by the Government chemist. By letter dated March 24, 1948, the appellants' solicitor required the prosecutor to call the public analyst as a witness. He was accordingly called, and he produced certificates which showed that the samples were deficient in meat content. Evidence was called on behalf of the appellants to the effect that, having first heard of the sampling on February 27, 1948, they were unable to ascertain which of their employees had weighed and mixed the sausage meat and sausages, and were therefore unable to avail themselves of the defence offered by s. 83 of the Act of 1938.

Before the justices it was contended on behalf of the appellants (1.) that the prosecutor had wrongly refused to deliver one part of the samples to them when required so to do; (2.) that the sampling officer had failed to inform them of his intention to have portions of the samples analysed by the public analyst; (3.) that the delay in informing them that samples had been taken prevented them from identifying the person responsible for the commission of the offence charged, thus depriving them of the defence available to them under s. 83, sub-s. 1; and (4.) that the alleged deficiency had not been proved.

It was contended for the prosecutor (1.) that the prosecutor had rightly refused to deliver one part of the samples to the appellants; (2.) that there was no statutory obligation on the sampling officer to inform the appellants of his intention to have parts of the samples analysed; and (3.) that, as the appellants had, in fact, informed the sampling officer of the name of the employee who had made consignments in question, they could have brought him before the court.

The justices convicted the appellants and fined them 10*l.* and 5*l.* 5*s.* 0*d.* costs on each of the three informations. The question for the opinion of the court was whether the justices came to a correct determination in point of law.

Collard for the appellants. This conviction was wrong because the requirements of s. 70, sub-ss. 1 and 2 of the Food and Drugs Act, 1938, as to the forwarding and notifying of samples to the appellants were not complied with. It is a condition precedent to the institution of a prosecution under this Act (*a*) that the samples should be properly divided into three parts, and, if an analysis is intended, that the seller or his agent be informed forthwith; (*b*) that, if the sampling officer is required so to do, he should deliver one part of the sample to the seller or his agent. The effect of sub-ss. 1 and 2 when read together, is to incorporate (by reason of the proviso to s. 1) the provisions of sub-s. 1 (*a*) into sub-s. 2 wherever samples are taken and no name and address of the supplier appear. Finally the magistrates were not entitled to accept the unsupported evidence of the public analyst. His knowledge of the analysis was not first hand and his personal knowledge was very limited.

F. H. Lawton for the respondent. The sampling officer was justified in not forwarding samples to the appellants. The word "retain" used in the Act can have no other meaning that its literal one. A statutory duty was imposed on the sampling officer by s. 70 to retain the sample, and the court, when considering sampling procedure, must look to s. 70, sub-s. 1 (*a*) and s. 10, sub-s. 4. With regard to goods in respect of which no name and address appear the sampling officer must retain the sample up to the date of the hearing: *British Fermentation Products, Ld.* v. *Teal* (1). The analyst was the person whom the appellants themselves might require to be called under s. 80, sub-s. 1, and in fact he was so called. He also referred to *Winterbottom* v. *Allwood* (2), *Southwell* v. *Ross* (3) and *Lowery* v. *Hallard* (4).

Collard in reply. Had the legislature contemplated the retention of more than one part by the sampling officer then the word "part" in s. 80, sub-s. 4, would appear in the plural. As it does not, then the word "retain," in that section, can have no reference to the part of the sample required to be delivered to the supplier.

LYNSKEY J., at the request of HUMPHREYS J. delivered the first judgment. On this appeal three points have been raised. The appellants contended that the appeal should be allowed because (*a*) the respondent did not deliver, when required so to do by the appellants' solicitor's letter, one part of the sample which he had taken, (*b*) the respondent failed to notify the appellants forthwith that he had taken samples and that he intended to submit these samples for analysis, (*c*) the public analyst called at the proceedings before the magistrates was not the right person to call, or, alternatively his evidence should

(1) [1943] K. B. 275.
(2) [1915] 2 K. B. 608, 619.
(3) (1946) 110 J. P. 79.
(4) [1906] 1 K. B. 398.

have been supplemented by that of his assistants. The first two points may be considered together. They depend on the construction of s. 70, sub-ss. 1 and 2 of the Food and Drugs Act, 1938. Section 70, sub-s. 1, is concerned with the case where the sample of food was taken on the premises of a person who was proposing to sell and might be liable for offering for sale food contrary to the Act. Section 70, sub-s. 2, is concerned with the case where the sample was taken when the goods were in transit, or after they had left the possession of the vendor, and had reached the premises of the purchaser, consignee or consumer. It was contended for the appellants that, where a sample was taken and no name or address of the consignor appeared, the effect of sub-ss. 1 and 2 of s. 70, when read together, was that, by virtue of the proviso to sub-s. 1, the provisions of s. 70, sub-s. 1 (*a*) were incorporated into sub-s. 2. This is a pure question of construction. The effect of the proviso is to incorporate the provisions of sub-s. 1 into sub-s. 2, except in so far as the provisions of sub-s. 1 concerned the giving of information and the manner of proceeding with regard to samples. By the proviso, the provisions of sub-s. 2, when samples were taken from goods in transit or at their destination at the premises of the consignee or consumer, are substituted for those of sub-s. 1. The effect of sub-s. 2 is to impose, where the name and address of the consignor appeared on the goods, an obligation on the sampling officer to give notice, and without demand to send the samples to the consignee by registered post. The question of demand does not arise; it is an obligation imposed on the sampling officer without demand. With regard to goods in respect of which no name and address appeared the sampling officer's obligation is imposed by sub-s. 1. If he intends to submit a sample to be analysed by a public analyst, he must deal with it in the manner provided by sub-s. 1, except that he must retain the first-mentioned part of the sample. Those words mean what they say, and the sampling officer is bound to retain the sample, until the hearing. The duties imposed on a sampling officer are purely statutory. The rights given to the vendor or the person proceeded against are likewise purely statutory; and unless the Act conferred a right to have one of the samples submitted to him, he is not entitled to compel the sampling officer to deliver it. Such a right is conferred on him when samples were taken on his premises, and also when goods were sampled which bore his name and address and the sample was taken in transit or at the destination

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Lynskey J.

of the goods; but no such right is conferred on him when the sample was taken from goods in transit, or when they reached their destination, if his name and address did not appear. The relevant words in the statute are so clear that it is not open to the court to read into them anything which confers such a right.

The final point taken on appeal was that the public analyst was either not the right person to call or that his evidence should have been supplemented by that of his assistants, and that in the absence of the assistants the prosecution had failed to prove the deficiency in meat content. The analyst was the person whom the defendants might require to be called, under s. 81, sub-s. 1. The appellants in fact required the analyst to be called and he was called as a witness, and the effect of that was, that his certificate in its prescribed form ceased to be evidence. The justices heard him and were satisfied by the evidence which he gave that the prosecution had proved the offence. The justices were entitled to come to the conclusion which they reached. The appeal must be dismissed.

Humphreys and Byrne JJ. agreed.

Appeal dismissed.

Solicitor for the appellants: *P. R. Kimber.*
Solicitor for the respondent: *C. W. Radcliffe.*

L. F. J. McD.

1948
Nov. 25.

Lord Goddard C.J., Hilbery and Birkett JJ.

PARRY *v.* ANGLESEY ASSESSMENT COMMITTEE

Rating — "Agricultural building" — Farmer's motor-car kept in farm building—Car used for social as well as farm purposes—Increase of assessment—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 2.

A farmer kept his saloon motor-car in one of the buildings of his farm. Except that it could be used with a trailer, it was not specially adapted for farm purposes, but was in fact used for a variety of such purposes. It was also occasionally used for social and domestic purposes, such as occasional visits to places of amusement and places of worship. It was licensed and insured as a private car. The building in question was used each year to shelter ewes and lambs, and at such times the car was moved into a barn. Quarter sessions confirmed the decision of the local assessment committee to increase the rateable value of the farm in respect of the building in question, on the ground that it was not an " agricultural building " within the meaning of s. 2, sub-s. 2, of the Rating and Valuation (Apportionment) Act, 1928, because not " used solely in connexion with agricultural operations " and so not free from rating. On his appeal, the farmer contended that quarter sessions had given an erroneous decision of law by construing s. 2, sub-s. 2, as if it enacted that no building used as was that in question could be an " agricultural building."

Held that, as quarter sessions had found that the car was both a private and a farm car, it was a question of fact for them whether its use as a private car was so slight and occasional as to render applicable the principle de minimis non curat lex, and that they were entitled to reach the conclusion that a building used to garage a car a substantial part of the use of which was for private, as distinct from farm, purposes, was not an " agricultural building " within s. 2, sub-s. 2, exempt as such from rating.

CASE STATED by Anglesey quarter sessions.

A proposal was made by the rating authority for the rating area of the rural district of Twrcelyn for the amendment of the valuation list by increasing the assessment of a farmhouse occupied by the appellant from 14*l*. gross value and 8*l*. rateable value to 16*l*. and 10*l*. respectively, in respect of a building or shed used as a garage.

The following facts were proved or admitted before quarter sessions: The appellant, a farmer, occupied, and carried on his business at, Ynys Bach farm, Anglesey, and also on land in the adjoining parish of Rhosybol, some four and a half miles from Ynys Bach. The land at Ynys Bach was of some one hundred and eighty-five acres, and the other holding of some thirty-five acres. The farmer had for upwards of twelve years owned a ten horse-power Morris motor-car which he used, inter alia, for general purposes connected with his farm and the other holding, both of which were agricultural land within the meaning of s. 2 of the Rating and Valuation (Apportionment) Act, 1928. The car was a saloon model not specially adapted for farm purposes, save for drawing a trailer, and the farmer held a third-party insurance policy and a licence appropriate for a private car. In particular, he used the car, with or without a trailer, for attending markets and carrying to and from them young animals, eggs and other produce of his agricultural land, to carry fodder for animals, seeds, and

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farm produce, and to travel between Ynys Bach and the land at Rhosybol. The car was also used, when necessary, to transport a veterinary surgeon to and from the farm when sick animals needed attention. In addition to those purposes, the farmer also used the car to visit a place of worship, and from time to time to go to Bangor to visit the cinematograph, and for general domestic or recreational purposes.

He kept the car in a shed which was one of the buildings standing on the farm at Ynys Bach. One of the walls of the shed was composed in part of the side wall of a barn and in part of one of the walls surrounding a kitchen garden. The rest of the shed was constructed of sheets of corrugated iron. The whole of the shed was built by the farmer before he acquired the car. Besides using the shed for housing the car he used it as a shelter for ewes and lambs during a few weeks in each year. While the shed was being so used the car was housed in an adjoining Dutch barn. The shed measured some twenty-five feet by eight feet.

Before December 12, 1947, no assessment for local rates had been made in respect of the shed. On that date the assessment committee determined the rating authority's proposal to increase the farmer's assessment by assessing him in respect of his occupation of buildings at Ynys Bach in the sum of 16*l.* gross value, which was an increase of 2*l.* on the previous assessment.

On his appeal to quarter sessions, the farmer contended that the shed was an agricultural building within the meaning of s. 2, sub-s. 2, of the Act of 1928 because the car was used solely for agricultural purposes as defined by the Act and the shed itself was, therefore, used solely for such purposes. The assessment committee contended that the shed was not an "agricultural building" within s. 2, sub-s. 2.

Quarter sessions held that the shed was not an agricultural building, and confirmed the assessment. The farmer appealed.

Scott Henderson K.C. and *Lyon Blease* for the appellant farmer. This motor-car is kept for the purposes of a farmer. The farmer could not run his farm without the car. Admittedly he does not get red petrol.

[Lord Goddard C.J. If he had a van which he was using for agricultural purposes, he would get red petrol.]

There is no difference between the use which the farmer is making of this car and that which he used to make of a pony and trap. The rating authority cannot say that a stable is not an agricultural building merely because it is sometimes used for other purposes. On the facts stated by quarter sessions this court is free to draw its own inferences.

[HILBERY J. It was a question of fact for the justices whether the use made of the car for non-agricultural purposes was sufficient to make the building in which it was housed a building not used for agricultural purposes.]

But a building cannot, surely, be said to cease to be used for agricultural purposes merely because something kept in that building is occasionally used for other, besides agricultural, purposes. This building would not cease to be used for agricultural purposes merely because a guest of the farmer happened to put his car in it for a few nights. To hold that, because of this occasional use of the car for non-agricultural purposes, the building in which it is housed is not an agricultural building is the fallacy into which the justices have fallen. They have held in effect that no building so used can be said to be an agricultural building. The erroneous construction which they have thus placed on s. 2 of the Act of 1928 gives rise to the question of principle in this case.

Simes K.C. and *Roots*, for the assessment committee, were not called on to argue.

LORD GODDARD C.J.: This case raises a very short point. The farmer used his car for the purposes of his farm, and to take his produce to market. He also used it for a variety of domestic and social purposes. Therefore the car is not merely a farm wagon or implement, but partly that and partly a private car. Section 2 of the Act of 1928, which might enable this building to escape from rates, defines agricultural buildings as " buildings occupied together with agricultural land or being " or forming part of a market garden and in either case used " solely in connexion with agricultural operations thereon." It seems to me that quarter sessions have come to the conclusion that this car which is housed in this building is both a private car and a farm car. It is really for them to come to the conclusion whether its user as a private car is so slight and so occasional that the doctrine of de minimis might fairly be applied. That is a question of fact for the justices to decide. It is a matter of degree.

It seems to me clear, on the facts which they have found, that they have applied their minds to the right point. They

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have come to the conclusion that they cannot regard this building which garages a car, a substantial portion of the user of which is for private domestic, and not agricultural, purposes, as a building solely used in connexion with agricultural operations. As the question was therefore essentially one of fact for quarter sessions, we cannot disturb their finding.

HILBERY J.: I agree.

BIRKETT J.: I agree.

Appeal dismissed.

Solicitors for the appellant farmer: *Ellis & Fairbairn.*
Solicitors for the assessment committee: *Whitfield, Byrne & Dean, for R. Gordon Roberts & Co., Llangefni.*

R. C. C.

1948
Nov. 25.

Lord Goddard C.J., Hilbery and Birkett JJ.

BECK *v.* BINKS.

Revenue — Customs — Purchase tax — Carrying uncustomed goods with intent to evade import duty—Offence committed elsewhere than at place of importation—Evasion of purchase tax and import duty one offence—Customs Consolidation Act, 1876 (39 *&* 40 *Vict., c.* 36), *s.* 186—*Finance Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 23), *s.* 11, *sub-s.* 1.

The offence of "knowingly . . . . carrying . . . . or in any "manner dealing with" uncustomed goods "with intent to defraud "His Majesty of any duties due thereon," contrary to s. 186 of the Customs Consolidation Act, 1876, is not only committed at the port of entry or the place where the goods are actually landed in the United Kingdom. It is committed anywhere in the realm by a person acting in the manner described by the sub-section.

The effect of s. 11, sub-s. 1, of the Finance Act, 1944, is to constitute purchase tax on imported goods a customs duty. Where, therefore, uncustomed goods are dealt with contrary to s. 186 of the Act of 1876, one offence only is committed notwithstanding that the intention is to evade both customs duty roper and purchase tax.

CASE STATED by a metropolitan magistrate.

Informations were preferred against the appellant one of which charged him with knowingly carrying uncustomed goods—two hundred and eight watches—on April 13, 1948, with intent to defraud His Majesty of the duties on them, contrary to s. 186 of the Customs Consolidation Act, 1876 ; and another with knowingly carrying goods chargeable with purchase tax—two hundred and eight watches—on April 13, 1948, with intent to defraud His Majesty of the tax due on them, contrary to s. 186 of the Customs Consolidation Act, 1876, as applied by s. 11, sub-s. 1, of the Finance Act, 1944.

At the hearing of the informations, the following facts were proved or admitted. An officer of H.M. Customs who was keeping watch on the appellant found that he was carrying in a briefcase two hundred and eight Swiss watches on which, it transpired, duty had not been paid. The appellant was arrested when in possession of the watches and apparently trying to pass them to somebody else. He knew that the watches were uncustomed.

It was contended for the appellant, inter alia, that he could not be said to have been carrying the watches " with intent " to defraud His Majesty " of the duty or purchase tax, because such an offence could only be committed by the actual smugglers or importers of the goods, or the persons engaged in carrying the goods from the ship, quay, aircraft, landing-ground or warehouse at the port of importation with intent there to evade payment of duty or tax ; that s. 186 of the Act of 1876 had no application to distribution or possession of goods which might have been smuggled previously at such places as the port of importation ; that s. 11 of the Finance Act, 1944, created no such offence as carrying goods chargeable with purchase tax with intent to defraud His Majesty of the tax due on them ; that the effect of the section was that purchase tax chargeable on imported goods was to be deemed to be a customs duty for all purposes under, inter alia, s. 186 of the Act of 1876 ; and that in consequence the first charge, of carrying uncustomed goods with intent to defraud His Majesty of the duty thereon, included both customs duty and purchase tax, and that only one offence, accordingly, could be charged on the facts found.

It was contended for the prosecutor that the offences created by s. 169 and the following sections, in particular s. 186, of the Act of 1876 were not confined to the actual bringing of goods into the country, but extended to all dealings with uncustomed goods at any place in the United Kingdom ; that the appellant had not discharged the burden which was on him of proving that duty and purchase tax had been paid or excused ; and that

s. 10, sub-s. 4, and s. 11 of the Act of 1944 had created a new and separate offence where the uncustomed goods were liable to purchase tax as well as import duty, and that two charges were accordingly properly laid.

The magistrate was of opinion that the defendant was guilty of the two offences charged. He sentenced him on each charge to six months' imprisonment and a fine of 2,000*l.* with the alternative of three months' imprisonment, the terms of imprisonment on the two charges to be consecutive.

The defendant appealed.

Serjeant Sullivan K.C. and *Baerlein* for the defendant.

John Foster for the prosecutor.

The arguments are sufficiently indicated by the contentions advanced before the justices.

LORD GODDARD C.J. Serjeant Sullivan has argued that s. 186 of the Customs Consolidation Act, 1876, applies only to goods which are being carried or taken into possession at the port of entry, because it is at the port of entry that the duty has to be paid; and that if a person is in possession of the goods away from the port of entry they are liable to seizure, but he cannot purge his crime, if he has committed one, by paying the duty.

It seems to me that this point is too clear for argument. Section 186 makes it an offence for anyone knowingly to acquire possession of uncustomed goods or to " be in any way " knowingly concerned in carrying, removing, depositing, " concealing, or in any manner dealing with any such goods " with intent to defraud His Majesty of any duties due thereon."

If a person is knowingly carrying uncustomed goods, he is assisting in the smuggling of the goods; for while goods are no doubt smuggled when they are brought into the country it is no good bringing smuggled goods into the country unless something can be done with them. Such a person is intending to defraud His Majesty of the customs as much as anybody else. The intent is there: it is all part of one operation. When, as here, it is found that a man is dealing with two hundred and eight watches which are uncustomed, I myself think it really beyond any question that he is carrying goods with intent to defraud His Majesty of the custom. Otherwise, a most extraordinary lacuna is left in the Act, for it can then be said that, once a man has got away from the port of entry or from the place where the goods were actually landed, no one dealing with the smuggled goods and carrying them inland will ever be guilty of an offence. I do not think that that has ever been held, and I am certainly not prepared to hold it now. I think it clear that this appellant was dealing with—that is, carrying—uncustomed goods, and that he was carrying them with intent to defraud His Majesty of the duties thereon.

The second point is quite different: a separate charge was preferred against the appellant of evading purchase tax, and it is said that, as these goods which are imported bear not only customs duty but purchase tax, therefore the person dealing with goods on which those duties have been evaded is committing two offences and not one.

That point depends on the wording of s. 11, sub-s. 1, of the Finance Act, 1944, which concerns purchase tax. The section seems to me to put the matter beyond doubt. It provides: "The Customs Consolidation Act, 1876, and enactments "amending that Act and other enactments (including "provisions of regulations or other instruments having "statutory effect) relating to customs generally shall have "effect, subject to the provisions of this section and with "such exceptions and adaptations as may be prescribed, in "relation to chargeable goods"—that is, goods chargeable with purchase tax—"imported into the United Kingdom, "whether liable to any duty of customs or not, as if all such "goods were liable to duties of customs and as if those "duties included tax chargeable by virtue of importation." That seems to me to put the matter clearly: it shows that, with regard to imported goods, purchase tax is to be regarded as a customs duty; it simply increases the customs duty. Therefore, if a man evades one tax, no doubt he evades the other tax. His crime, however, is only one, not two: he is evading a tax which is made part of the customs duty; he is evading the customs and he is evading the purchase tax; but by the operation of s. 11 of the Act of 1944 the two are to be regarded as one thing—customs duty. He is convicted of evading customs duty, and as that duty includes both the customs duty and the purchase tax he cannot be convicted of two offences. In my opinion, the appellant here was guilty of one offence and one offence only, and, therefore, the sentence passed on the second charge, the evasion of purchase tax, must be quashed. The sentence on the other charge stands, for

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this court is not concerned on a case stated with the question of sentence.

HILBERY J. I agree.

BIRKETT J. I also agree.

Appeal allowed in part.

Solicitors for the appellant: *Alfred Kerstein & Co.*
Solicitor for the prosecutor: *The Solicitor for Customs and Excise.*

R. C. C.

1948
Dec. 3, 6.

Hilbery J.

E. & S. RUBEN LIMITED *v.* FAIRE BROTHERS & COMPANY LIMITED

Contract — Sale of goods — Sale by sample — Goods defective—Delivery to third party by seller for buyer—Effect on buyer's right to reject——Rubber sheets sold by measurement—Sale by description—Sheets of different size—Breach of contract—Sale of Goods Act, 1893 (56 & 57 *Vict., c.* 71), *s.* 35.

The plaintiffs sold to the defendants a quantity of rubber material samples of which had been submitted to the buyers. It was to be in rolls of specified length and width. When the buyers placed their order with the sellers they had contracted with a company of footwear manufacturers to sell the rubber to them. Accordingly, in placing their order the buyers asked the sellers, and the latter consented to deliver the rubber direct to the footwear company at an agreed delivery charge. The footwear company rejected the rubber because it was crinkly, unsuitable for use in their machines and not up to sample. The buyers then purported to reject the goods by telephone and by letter. The sellers brought an action for the price of the goods and delivery charges, and the buyers counterclaimed for damages for breach of warranty.

Held, that the buyers, in asking the sellers to deliver on behalf of the buyers the goods ordered to the footwear company, were constructively taking delivery of them at the sellers' premises, were doing an act in relation to them which was " inconsistent with " the ownership of the sellers " within the meaning of s. 35 of the Sale of Goods Act, 1893, and thereby lost their right to reject the goods; that they were thus thrown back on their remedy for breach of warranty; that the measurements specified in the contract made the sale one by description as well as by sample; that the fact that the rolls were not of the specified measurement was thus also a breach of the contract; and that the goods were none the less out of accord with the sample because only a simple process was required to make them accord with it.

Action tried by Hilbery J.

By an agreement, partly in writing and partly oral, contained in a letter from the plaintiffs, E. & S. Ruben, Ltd., to the defendants, Faire Bros. & Co., Ltd., dated June 3, 1947, in an order from the buyers dated June 17, 1947, and in a telephone conversation between one Ruben, as agent for the sellers, and a representative of the buyers, the buyers agreed to buy from the sellers ten tons of vulcanized rubber material in forty-one-foot rolls, five feet wide, six ounces to the square yard fit for use in the manufacture of soles for footwear, and similar in all respects to two samples supplied by the sellers to the buyers. The second sample was supplied to the buyers at their request, and, in reply to further inquiries put by them, the sellers informed them that the rubber was fine natural rubber and did not age.

The buyers were buying the rubber for resale to Skelmersdale Shoe Co., Ltd., manufacturers of footwear. On June 17, 1947, they sent a traveller to the Skelmersdale company and contracted to sell them the rubber on the basis of the sample which the traveller produced. On that day the buyers ordered ten tons of the rubber from the sellers, one-half of it to be delivered at once. The sellers undertook to act for the buyers in dispatching the five tons to the Skelmersdale company on terms of carriage to be agreed between buyers and sellers. That telephone conversation was confirmed by a written order from the buyers which did not, however, refer to samples or specify any measurement except that the rolls were to be five feet wide. Hilbery J. found that that order was not intended to set out exhaustively all the matters which had been agreed between the parties, but was merely intended as a confirmation of the agreement in fact reached. He found, as a matter of reasonable inference, that, after the buyers had placed that order in writing with the sellers, they confirmed their contract of resale to the Skelmersdale company and accordingly sent the sellers instructions to address the goods to that company, and that the sellers acted for the buyers in so delivering the goods. The price to be charged to the buyers for delivery of the goods in Lancashire was fixed by agreement subsequently.

When the rubber was delivered to them, the Skelmersdale company rejected it on the grounds that it was delivered not in rolls but in small lengths, and not in lengths of forty-one feet as ordered, that it was hard and crinkly and could not be cut on a power press, that it was therefore useless for the manufacture of footwear, and that it was not in accordance with sample. That company accordingly rejected the goods and refused to pay the price.

The sellers, having applied to the buyers for payment without success, brought this action for 1,187*l.* 3*s.* 0*d.*, the price of goods sold and delivered, including 16*l.* 2*s.* 6*d.*, the agreed payment for carriage. The buyers had informed the sellers by telephone on June 22, 1947, and by letter on July 4, that they rejected the goods, and they counterclaimed 193*l.* 15*s.* 1*d.* for loss of profit.

Caplan for the plaintiff sellers (on the question of the right to reject). If defective goods are to be validly rejected, the buyers must not delay in rejecting them: *Heilbutt* v. *Hickson* (1). The authorities show that, while a buyer may be entitled to damages if goods are not in accordance with contract, yet, once he has purported to deal with the goods as if he were their owner, he has put it out of his power to reject them: see the dictum of Fletcher-Moulton L.J. in *Wallis, Son & Wells* v. *Pratt & Haynes* (2), in his well-known dissenting judgment which found acceptance in the House of Lords. Whatever rights the buyers may or may not have, once it is proved to the satisfaction of the court that they have dealt with the goods in a way inconsistent with the sellers' ownership of them, they have lost their " higher right " of rejection, as Fletcher-Moulton L.J. called it. The mere resale to the Skelmersdale company would, it is submitted, itself be enough to deprive the buyers of their right of rejection: but a resale coupled with dispatch of the goods to the sub-purchaser and the delay in rejecting make the case still clearer. The buyers, by telling the sellers that they wanted the goods sent to the Skelmersdale company, were in effect saying that they had accepted them. Their action was both an intimation of acceptance of the goods and a dealing with them as owners. Delivery of the goods to Lancashire by the sellers for the buyers was a disposal of the goods by the buyers. Once a buyer has delivered the goods to his sub-purchaser, there is an end to the right of rejection: see *Hardy & Co.* v. *Hillerns and Fowler* (3). The sending of the goods to the Skelmersdale company could only have taken place on the basis of an acceptance of the goods

(1) (1872) L. R. 7 C. P. 438.
(2) [1910] 2 K. B. 1003, 1014, 1015.
(3) [1923] 2 K. B. 490.

by the buyers, for the sellers had no interest whatever in the dispatch of the goods to Lancashire. [*Benaim & Co.* v. *De Bono* (1) referred to.] The only case which goes against the proposition contended for is *Molling & Co.* v. *Dean & Son, Ld.* (2) which, however, has been considered unintelligible as reported. The decision, as it stands, is quite out of accord with all the other decisions.

Roche (*Beecroft* with him) for the buyers. The argument for the sellers appears to mean that if a man orders a dozen bottles of port and the sellers deliver a dozen of sherry, he may reject; but that if he orders a dozen bottles of port and ask the sellers to deliver them, whether as gift or as a re-sale, it is immaterial which, to a friend of the buyer, and they send sherry, the buyer cannot reject. The fact that the buyers here ordered the goods to be sent to one person rather than another has nothing to do with acceptance. If the sellers had put on the lorry goods in accordance with the contract description, the property in them would have passed to the buyers; but they loaded non-contract goods, so no property passed: it remained in the sellers. Therefore the buyers passed no property in the goods to the Skelmersdale company. The buyers, to lose their right of rejection, must have done something by way of exercising ownership with their eyes open. Here the buyers did nothing with the goods after making their contract with the sellers; it was a term of the original contract that the goods should be sent by the sellers to the buyers' sub-purchaser. After the purchase, the buyers did nothing at all. Therein lies the distinction between the present case and the authorities on rejection. What has been done is only something in pursuance of the original contract. There has been no act of ownership by the buyers.

[HILBERY J. Do you say that, because there was a breach of contract by the sellers, your resale of the goods could not amount to acceptance of them or to an act inconsistent with ownership of the goods by the sellers?]

My act could be an acceptance in those circumstances if it came within s. 35 of the Sale of Goods Act, 1893. To do that the act of resale must have taken place after delivery of the goods. Here it did not.

Caplan in reply. For the purposes of s. 35 it does not matter when the purchaser intimates that he has accepted the goods, whether after or before their delivery. Nor does it matter that the buyer stipulates in the original contract that the goods are required for a sub-purchaser. If the buyer says that to the seller, he is saying in unequivocal terms that he is accepting the goods. If the buyer says to the seller that, instead of sending the goods to him (the buyer), he is to send them on the buyer's behalf to Lancashire, when the seller accepts that instruction there is a transfer of property because the seller thereby changes the character in which he holds the goods. The argument for the buyers here is based on the conception that there was no delivery until the rubber was delivered to the sub-purchaser, the Skelmersdale company. That cannot be right: how can goods which are being sent by the seller somewhere on behalf of the buyer be said not to be delivered until they arrive? It is submitted that they were being delivered constructively. They were delivered *for* the buyer. Once delivered to the sub-purchaser, they were delivered *to* the buyer. Anything that the buyers do which results in the goods being landed up in Lancashire cannot, surely, be anything but "inconsistent with the ownership of the seller" within the meaning of s. 35.

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(1) [1924] A. C. 514, 517, 518.

(2) (1901) 18 T. L. R. 217.

HILBERY J. The difficulties which have arisen in this case—and it bristles with difficulties—arise because of the way in which the parties expressed themselves and acted in transacting this business. It seems to me eminently a case where different lawyers might form different opinions on the different points; but all these matters of uncertainty arise because the parties really did express themselves so loosely in making their bargain. [His Lordship stated the facts, reviewing the evidence and correspondence, and continued:] I think it clear that the buyers did in fact purport to reject the goods, saying in effect that they were not of the description, or in accordance with the sample, given, and that they would not pay. True, they do not actually use the word "reject," or say that "the goods are "lying here awaiting your collection," things which are generally said. It is odd that, while, as I find, they did intend to intimate rejection of the goods, even when they came to plead, they said: "by reason of the premises the said "Skelmersdale Shoe Company Limited, rejected the said "material supplied by the sellers as they were entitled so to "do and refused to pay the buyers the price thereof. In the "premises the buyers are not liable to pay the sellers the "amount now claimed or any part thereof." It is not pleaded that the buyers rejected but that the Skelmersdale company rejected. However, I think that I must have regard to the realities of the transaction, rather than rely too strictly on the pleadings.

The next question is whether the buyers had lost their right to reject. If they resold to the Skelmersdale company after making their contract with the sellers and after delivery of the goods to them, even constructive delivery, that is strong evidence that they have acted in a way which is inconsistent with their right to reject. By s. 35 of the Sale of Goods Act, 1893: "The buyer is deemed to have accepted the goods "when he intimates to the seller that he has accepted them, or "when the goods have been delivered to him, and he does any "act in relation to them which is inconsistent with the owner-"ship of the seller . . . ." When the buyers' representative intimated to the sellers that he would take ten tons of the rubber offered, five tons to be delivered at once and five tons later, and asked them to act for him and send the goods direct to the Skelmersdale company and they agreed, the buyers were taking delivery constructively at the sellers' premises when the sellers set aside goods against the contract. Thereafter the sellers were acting for the buyers as agents in putting the goods on the lorry and dispatching them on their journey to Lancashire. If that is so, then as Atkin L.J. pointed out in *Hardy & Company* v. *Hillerns & Fowler* (1), "we have "here to face the problem whether the act of the buyers in "reselling and dispatching the goods was inconsistent with "the ownership of the sellers. If it was, they must be deemed "to have accepted them . . . . all the words of the section "[35] must have effect given to them. The words are: 'when "'the goods have been delivered to him'—that is to the buyer "—'and he does any act' of the kind specified. That means "that the buyer must have got delivery before he does the "act."

Here, I think, the buyers took delivery at the sellers' premises when the goods were set aside against the contract. Thereafter the handling of the goods by passing them on to the carrier was an act done for the buyers with their goods by the sellers; an act done by the sellers for the buyers with the buyers' goods. That being so, it appears to me that the buyers lost their right to reject and must be driven back on to their plea of breach of warranty. Whether that will give them

(1) [1923] 2 K. B. 498.

the whole amount of the sellers' claim or not, I do not know; but even if the buyers had been able to establish that they had not lost their right to reject and did reject, I am not satisfied by the evidence that they could recover their loss of profit on the resale, because such evidence as I have of the resale to the Skelmersdale company seems to indicate the sale of an article on totally different terms and of a totally different description, though on the same sample.

Having found, as I have, that the contract was for Linatex, in forty-one-foot rolls five feet wide—nothing turns on the six ounces to the square yard—at 1*s.* 9*d.* a pound as per the small sample, I am satisfied—and it is not now challenged—that the measures of the material supplied were incorrect. I am satisfied that the rubber was in rolls inasmuch as it was rolled up in lengths, but it was not according to the measurements specified when the rubber was originally described. It is quite clear that that matter, if the parties specified it, forms a definite term and condition of the contract. I need not refer to the cases cited on that point. There is no doubt that the measurements given in this case were words of description. The goods were not in accordance with the description.

It is, however, argued that they were in accordance with the sample although they were crinkly and folded in some cases. [His lordship referred to the condition of the rubber as delivered, and continued:] It is argued that all these faults could all have been corrected by warming the rubber and pressing out the crinkles when it was warm. It is, however, no compliance with a contractual obligation for an article to be delivered which is not in accordance with the sample but which can by some simple process, no matter how simple, be turned into an article which is in accordance with the sample on which the contract was made.

In the circumstances, the goods were in my opinion in accordance neither with the description nor with sample. While the buyers did, in fact, intend to convey to the sellers that they rejected the goods, and the sellers understood that the buyers were rejecting, nevertheless, for the reasons given, the buyers have lost their right to reject and must treat the matter on the basis of breach of warranty. Therefore, on the claim, subject to the counterclaim and to set-off of any amount due on it, there must be judgment for the sellers. The counterclaim can be determined, when particulars of the alleged damage have been given, either by arrangement between the parties or by a Master in the King's Bench Division. That would be a cheap and simple way of disposing of the matter.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Saunders, Sobell, Greenbury & Leigh.*

Solicitors for the defendants: *McKenna & Co.*

R. C. C.

INSALL *v.* NOTTINGHAM CORPORATION.

C. A.
1948
June 17, 18.
Tucker, Somervell and Cohen L.JJ.

Landlord and tenant—Rent restriction—Standard rent—Rent at material date uneconomic — Special circumstances — Relevance — Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 11.

Provided that a rent is a real one, the fact that it is less than the true economic rent which might be obtained for the premises, or is for any reason preferential and so lower than it might be, is a matter to be excluded from the purview of the court in fixing the standard rent.

On September 1, 1939, a house of historic interest was occupied by the former freeholder as tenant of the local authority to whom he had sold the property. The former freeholder had for many years taken a great interest in the property and supervised its management. The plaintiff was, after determination of the abovementioned tenancy, granted by the landlords a tenancy at 120*l.* a year, and he subsequently applied to the county court under s. 11 of the Rent and Mortgage Interest Restrictions Act, 1923, to fix the standard rent, contending that it should be 50*l.* a year because the former freeholder, as tenant, was paying that rent for the premises on September 1, 1939. The county court judge held, on a consideration of the lease granted to the former freeholder and of correspondence between him and the landlords, that 50*l.* a year was not the real economic rent of the premises, but was a preferential rent granted to that tenant because of his interest in the property and his promise to the landlords to continue to supervise and manage it. He accordingly fixed 120*l.* a year as the standard rent. On the plaintiff tenant's appeal, the Court of Appeal found, on the documents, that there was merely a gratuitous undertaking, for an indefinite period, by the former freeholder, as tenant, to supervise the property, and that, even if there was a contractual obligation to that effect on the former freeholder, there was no evidence that it amounted to a promise to perform services as part of the rent.

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The court assumed, without deciding, that the evidence showed that the landlords had fixed the rent at 50*l*. because of a preference for the former freeholder as a tenant, and that 50*l*. a year was therefore not a true economic rent for the premises. On that assumption:—

Held, that the standard rent must be taken as 50*l*. a year, that being the actual rent at which the premises were let on September 1, 1939, since it was irrelevant that that sum did not represent the full economic rent of the premises and it was not the function of the county court to ascertain, for the purpose of fixing the standard rent, what the real economic rent was as distinct from the contractual rent at which the parties concerned had arrived.

Davies v. *Warwick* [1943] K. B. 329 discussed.

Chamberlain v. *Farr* (1942) 112 L. J. (K. B.) 206 applied.

Roberts v. *Jones* [1947] K. B. 221 explained and distinguished.

APPEAL from Nottingham county court.

The appellant was the tenant at 120*l*. a year of a house within the Rent Restriction Acts consisting of part of a property known as Newstead Abbey, of which the respondents, Nottingham Corporation, were the freeholders. The tenant applied to the county court under s. 11 of the Rent and Mortgage Interest Restrictions Act, 1923, to fix the standard rent of the premises at 50*l*. a year. The premises were brought within the Rent Restriction Acts by the Act of 1939. On September 1, 1939, they were already let under an agreement dated November 7, 1938, which purported to fix the rent at 50*l*. a year, that being the sum which was then being paid in money by the tenants to the landlords on September 1, 1939.

On that date, the tenants of the part of Newstead Abbey in question were one German and his wife. In 1938, Mrs. German, then the owner of the house, had sold it to Nottingham Corporation for 3,950*l*., which included certain other property. Part of the arrangement reached between the parties in negotiating the sale was that the Germans should be granted a tenancy of part of Newstead Abbey after the corporation had bought it, the rent to be 50*l*. a year.

It was contended for the corporation that the rent of 50*l*. a year did not represent the real economic rent of the premises, but was a preferential rent which had been agreed to in the case of German and his wife because he had for many years shown himself very much interested in the Abbey and the property generally, and had managed or supervised it, and promised to continue to do so, as a result of which the corporation let him and his wife have the premises in question on much better terms than they would have granted to other tenants.

The county court judge held that that was the true view of the negotiations which took place, and that German and his wife were given preferential terms. As, therefore, he did not regard the 50*l.* a year paid by German as a true economic rent for the premises, he fixed the standard rent at the 120*l.* a year paid by the tenant. The tenant appealed. The lease to the Germans and the correspondence between German and the landlords are set out in Tucker L.J.'s judgment.

L. A. Blundell for the tenant. " Rent " in the provisions of the Rent Restriction Acts referring to standard rent means the rent actually paid in money: see *Hornsby* v. *Maynard* (1). If there is a letting at a rent specified in money, the circumstances which may have influenced the parties in arriving at the specified figure are irrelevant : see *Davies* v. *Warwick* (2) and *Chamberlain* v. *Farr* (3). Exceptional cases are *Wheeler* v. *Wirral Estates, Ld.* (4), *Signy* v. *Abbey National Building Society* (5) where there was a furnished letting, *Macmillan & Co., Ld.* v. *Rees* (6) a business letting, *Conqueror Property Trust* v. *Barnes Corporation* (7), and *Roberts* v. *Jones* (8), where the premises were controlled by special legislation. If the house in question here was in fact let on September 1, 1939, as a dwelling-house at 50*l.* a year, with no extraneous element, such as furniture, included in the letting, there was a real and not a fictitious letting, and the rent was agreed between the parties and not forced on them by some extraneous matter, as in *Roberts* v. *Jones* (8), then the court is bound to hold that the standard rent is the 50*l.* a year at which it was let on that date. Where the county court judge has erred is in holding that actual rent is to be disregarded for the purpose of ascertaining the standard rent unless it appears from the circumstances of the letting that that actual rent is one which affords a criterion of the fair market value of the premises.

There is no affirmative evidence here that the various matters between the corporation and German on which the corporation, as landlords, rely had any influence on the sum arrived at for rent. There must be clear evidence of an extraneous cause as having led to the sum fixed if the actual rent being paid is to be disregarded in ascertaining the standard rent.

(1) [1925] 1 K. B. 514.
(2) [1943] K. B. 329.
(3) (1942) 112 L. J. (K. B.) 206.
(4) [1935] 1 K. B. 294.
(5) [1944] K. B. 449.
(6) [1946] W. N. 88 ; 62 T. L. R. 331.
(7) [1944] K. B. 96.
(8) [1947] K. B. 221.

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Heathcote-Williams for the landlords. The county court judge found that this was not a letting at a simple rent. It was a letting at 50*l.* a year only so far as the rent was expressed in money. The actual rent was the 50*l.* as expressed, plus a sum for German's services. It is impossible, where there was an arrangement like that between the landlords and German, with a variety of special features operating to decrease the rent, to extract a part of the arrangement—the monetary part of the rent—and declare that that is the standard rent. [*Walker Property Investments* (*Brighton*) *Ld.* v. *Walker* (1) referred to.] The rent payable by German included valuable services rendered by him. [*Signy* v. *Abbey National Building Society* (2) referred to.] The Rent Restriction Acts are concerned only with rent paid in money. Regard can only be had to rent for the purposes of ascertaining standard rent when the rent due from the tenant is due in money only. [*Hornsby* v. *Maynard* (3) referred to.] From the arrangement in force between the landlords and their tenant, German, on September 1, 1939, it is impossible to predicate a standard rent. Where rent is payable partly in money and partly in services, to have regard only to the monetary part of the rent will result in fixing on the premises in perpetuity a standard rent which is unreal. [*Roberts* v. *Jones* (4) referred to.] Where there are elements or conditions depressing or increasing rent, so that it is an artificial rent, you ignore it altogether in ascertaining standard rent. *Chamberlain* v. *Farr* (5) is distinguishable: there is no question of an uneconomic rent in the present case, for the rent of 50*l.* was economic because of the services which went with it. The 50*l.* was merely part of a larger transaction between the landlords and the Germans. In *Davies* v. *Warwick* (6) there was no question of special facts: the court was not addressing itself to the question which arises here. It is a question of law whether or to what extent a specified payment is the rent. [*Samuel* v. *Salmon & Gluckstein Ld.* (7) referred to.]

Blundell replied.

Tucker L.J. I will assume for the purposes of this judgment that there was evidence on which the county court judge could come to his decision. It was argued for the tenant that there was really no evidence on which the judge could come to that conclusion ; that the evidence merely indicated a desire or a liking on the part of the corporation for German because of his services and that they considered him for those reasons a suitable and desirable tenant ; but that there was nothing to show that their ultimate decision in fixing the rent at 50*l.* was arrived at through their having applied their minds to the question of giving him a reduced rent compared with anybody else. I do not think, having regard to the view which I take on the main question involved in this appeal, that it is necessary to express any opinion whether there was sufficient evidence to support that last finding by the judge, but I will assume that there was.

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(1) (1947) 177 L. T. 204.
(2) [1944] K. B. 449, 453.
(3) [1925] 1 K. B. 514.
(4) [1947] K. B. 221, 229.
(5) 112 L. J. (K. B.) 206.
(6) [1943] K. B. 329.
(7) [1946] Ch. 8, 13.

The course of the negotiations appears from the correspondence. On March 12, 1938, in a letter written by German to the chairman of the committee of the corporation who were handling the matter, it was stated : " I am prepared to offer " the relevant part of Newstead Abbey " to the City of Notting-" ham as follows : 750*l.* in cash and 2,000*l.* to be paid off in " 20 yearly payments without any interest. Mrs. German or " myself, so long as we live and wish to reside in our portion " of the Abbey, to be allowed to be tenants at a rental of 50*l.* " per annum, so that really the city would only be paying " 50*l.* a year to pay the 2,000*l.* off. That if we wish to leave " the Abbey portion, or the survivor wishes to leave it, this " can be done by giving three months' notice. I think I have " set out our ideas and offered the City of Nottingham a very " first-class property." On October 25, 1938, the town clerk wrote thus to German : " I enclose herewith : (1.) con-" veyance and duplicate from Mrs. German of the Newstead " Abbey property and Hawk Lawn and also the cottage in the " garage building which my committee have now agreed to " purchase at the figure you mentioned, viz., 300*l.* (2.) Con-" veyance by yourself of 3 roods 20 perches of land adjoining " Hawk Lawn. You will note that 30*l.* has been allocated as " the purchase price of this land and the purchase price of Hawk " Lawn reduced by the same amount. (3.) Agreement for " tenancy of the Newstead Abbey at 50*l.* per annum so long " as you and Mrs. German or the survivor shall live or desire to " reside there. Will you kindly read through the documents " and have them signed as indicated in pencil and return them " to me for stamping." The total purchase price was 3,950*l.* The letter continued : " I have asked the city treasurer to " let me have a cheque for 1,650*l.* The balance of 2,300*l.*

"will be payable by 20 yearly instalments of 115*l.* each "(100*l.* as originally agreed and 15*l.* in respect of the cottage)." On November 8, 1938, the town clerk wrote a letter enclosing a cheque for 1,650*l.* payable to Mrs. German on completion of the sale, in which he said: "Mr. Williams informs me that "the cottage in the garage building is vacant and that Hawk "Lawn is let to Thomas Bernard Stubbs of Haywood Oaks, "Blidworth, on a yearly (March) tenancy at a net rental of 34*l.* "per annum. I understand you have agreed to continue to "manage, on behalf of the corporation, the whole of the "properties acquired from Mrs. Marshall and Mrs. German." That observation was made after the whole of the bargain had gone through and the terms of the tenancy had been agreed and reduced to writing. It is simply a casual or incidental observation that the writer understood that German had agreed to continue to manage the whole of the properties on behalf of the corporation. In reply to that, on November 11, German wrote: "I am quite willing to look after the property "for the city, but I do not think it is advisable that I should "have anything to do with the receipts and payments." On December 5, the town clerk wrote enclosing the duplicate conveyance dated November 4, and the title deeds relating to the land purchased from one Fraser. On that the matter was completed.

It is only right to observe that, in the course of the evidence, the town clerk, referring to the negotiations, said: "Premises "were let at terms suggested by Mr. German during and as part "of the negotiations for the sale. Our object was to get control "of whole estate as an historical property. Mr. German agreed "to continue to control the estate for us." There is nothing to indicate the precise stage of the negotiations at which German had agreed to continue to control the estate.

In my view it is quite impossible to say that on that evidence and on those documents there was a binding contractual obligation on German that he would continue to manage these properties on behalf of the corporation—that he would have committed a breach of contract if, for example, within a day or two after the beginning of the tenancy, he had ceased to render the services. I take the view, on this material, that this was merely a gratuitous undertaking on his part, with no period of time fixed for its continuance—nothing more than a gentleman's agreement, or an honourable undertaking given in the course of negotiations. However that may be, if I am wrong about that, and what was said did constitute an obligation on the part of German, I am quite unable to take the view, which Mr. Heathcote-Williams advanced, that it came to a promise to perform services which amounted to part of the rent payable for these premises. Counsel argued that the rent was 50*l.* in money plus services. Having regard to the vagueness of the terms of the agreement with regard to the services, and also to the course which the negotiations took and to their business-like nature, for everything was reduced to writing and regulated carefully, with legal advisers to the consenting parties, I find it impossible to hold that the true view of this transaction, culminating in this tenancy agreement, is that 50*l.* does not really represent the rent and that in fact there could be no standard rent at that period for these premises because there was an unknown quantity, namely, the value of the services which German had undertaken to render. Therefore, I think that the rent was that fixed by the agreement between the corporation and Mr. and Mrs. German, namely, 50*l.*, unless it can be said that, because that did not represent the full economic value of the premises, it cannot be taken as the standard rent of the premises. That I regard as the substantial question which arises for decision in the present appeal.

It is necessary to refer to the terms of the agreement of November 7, 1938, arrived at after these negotiations. It is an ordinary tenancy agreement: " The landlords let to the tenants " and the tenants take all that messuage or dwelling-house " forming part of Newstead Abbey in the county of Nottingham together with the appurtenances . . . . on a yearly " tenancy from November 11, 1938, until determined as " hereinafter mentioned at a rental of 50*l.* per annum payable " half-yearly. The tenants . . . . agree (1.) to pay the reserved " rent at the times and in manner aforesaid. (2.) To pay " and discharge all existing and future rates taxes assessments " and outgoings payable by law in respect of the premises " either by the owner or occupier thereof (except landlord's " property tax). (3.) Not without the previous consent of the " landlords in writing to erect or suffer to be erected any other " building upon the demised premises." There then follow the usual covenants, including one " to yield up the demised " premises " and the usual undertakings on the part of the landlord to keep the premises in repair. There is provision for determining the tenancy. There is a proviso for re-entry in the event of non-payment of the rent reserved, that is the 50*l.*, or breach of any other covenant. It is provided that "if the "tenants or the survivor of them shall desire to determine the "tenancy hereby created at any time and shall give to the "landlords 3 months' previous notice in writing of such their "his or her desire and shall up to the time of such determination "pay the rent and perform and observe the agreements on their "his or her part hereinbefore contained then immediately on "the expiration of such notice the tenancy hereby created and "everything herein contained shall cease and be void." By cl. 3, "If the tenants or the survivor of them shall cease to "reside in the said premises the landlords shall be at liberty "to determine the tenancy."

There is not one word in that agreement putting on German any obligation to perform any service at all, either as a condition of the tenancy or as creating a collateral obligation on his part. I think that the real question is whether the fact, if it be a fact, and I am assuming that it is for the moment, that 50*l*. was not the true economic rent, but was a preferential rent granted to German because the corporation desired to have the benefit of his services and occupation of the premises, is an element which it is open to the county court judge to take into consideration in deciding what is the standard rent.

The judge's note of his own decision was as follows : "Letting "to German—was negotiated as part of conditions of sale by "Mrs. German to corporation—in light of services that had been "and were to continue to be rendered by Mr. German. "50*l*. reserve not a fair market criterion of rental value of "premises at time, but as part of terms of sale and services. "Clear this must have been so from all the surrounding facts "including rents at which similar houses part of same estate "let to other tenants. In my view first let within meaning of "Rent Acts when let to the applicant (the present tenant), "and 120*l*. is standard rent." When the judge came to give his actual decision upon the case, after referring to the cases which had been cited to him, in particular, *Roberts* v. *Jones* (1), he said: "As I understand language of Scott L.J., Rent Restriction "Acts refer only to a rent of a dwelling-house which at the time "of the rent being fixed was a free house so that the rent fixed "would prima facie afford criterion of fair market value. "It seems to me that as you can look to statute, so equally you "can look to other matters. As between the two parties they "were ignoring fair market values of the property and dealing

(1) [1947] K. B. 221.

"with it as part and parcel of a bigger thing. Counsel has "drawn my attention to other cases which do not fit in with "my view of the law. My view supported by *Roberts* v. "*Jones* (1) . . . . . On the facts of this case I am quite "satisfied that the letting to Germans was negotiated as part "and parcel of the terms of sale to the corporation. They "had acquired another part and anxious to acquire this part "owned by Mrs. German. Mr. German, moreover, had for "some time voluntarily acted as a sort of supervising agent. "Germans quite willing to transfer to corporation provided "they could go on living there. Mr. German willing to go on "supervising. It was part and parcel of the terms of sale "they should stay on at rent of 50*l.* and that Mr. German should "go on doing the services. Never any negotiation about the "rent."

The cases principally relied upon by Mr. Blundell on behalf of the tenant were *Davies* v. *Warwick* (2) and *Chamberlain* v. *Farr* (3). *Davies* v. *Warwick* (2) concerned a house which had in 1916 been let at a rent of 4*s.* 3*d.*, but which then went outside the Acts and was brought within the sphere of the Acts again by the Act of 1939, when it was let at 12*s.* 6*d.* The question was whether the standard rent was 12*s.* 6*d.*, the rent at which the premises were first let after September 1, 1939, or 4*s.* 6*d.*, at which they had been previously let in 1916. Scott and MacKinnon L.JJ. made certain observations which, I think, perhaps went beyond what was strictly necessary for the decision of that particular case, but which, nevertheless, require careful consideration. Scott L.J., discussing the hardship which, it had been suggested, would result by going back to a previous rent in 1916 which might bear no relation to the circumstances prevailing at the later date with which the court was concerned, said (4): "The statutory reference back to some "almost prehistoric letting might take one to a time when "economic conditions and the value of money were totally "different from what they are to-day." He gave instances and proceeded: "Or, again, a landlord might, as an act of "kindness, have let a cottage to some deserving person for a "short period at a nominal rent. The retainer dies, and the "landlord wants either to let at a market rent, or to sell. "In either choice he is penalized by the retrospective provision "in the Act. That Parliament was not intending to penalize

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(1) [1947] K. B. 221.
(2) [1943] K. B. 329.
(3) 112 L. J. (K. B.) 206.
(4) [1943] K. B. 332.

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"landlords is shown by s. 6 of the Rent and Mortgage Interest "Restrictions (Amendment) Act, 1933, which in certain "circumstances made the average rent of comparable houses "in the neighbourhood the test for the standard rent. In the "present case there is no evidence that either landlord or "tenant had any knowledge that the house had ever before "been let. Neither plaintiff nor defendant was called as a "witness, so that the allegations in the pleadings were never "tested. I cannot doubt that, if the hardships of the kind "I indicate had been foreseen by Parliament, discretion might "well have been given, and might by an amending Act still "be given, to the court to have regard to circumstances which "make the rigid application of the past-rent rule work unfairly, "and in such case to fix a rent with due regard to the fair value "of other houses in the neighbourhood and so temper the rigour "of the Act." MacKinnon L.J. said (1): "If reliance be "placed on a previous letting fifty or five hundred years ago, "the judge is given no discretion to take into account the "altered value of money. If the landlord proves that the "rent the tenant agreed to pay is perfectly fair, and is, in fact, "lower than the rent being paid by every other tenant of "identical houses, the judge is not allowed to consider that. "If the landlord proves that the previous letting years ago "was an act of charity at a nominal rent by the then owner to "his aged relative, or at a low or nominal rent to a servant, "the judge cannot take either of these facts into account. "If the landlord proves that under the old letting the tenant "agreed to do all the repairs whereas in the agreement with "the recalcitrant tenant the landlord had to do the repairs, "apparently, that is not a matter the judge is allowed to "consider. Indeed, if it were proved that at the old letting "relied on the landlord agreed to a very low rent in consideration of a lump sum paid down by the tenant, or in "consideration of the tenant putting the house in repair and "enlarging it, I find it difficult to see how the judge could take "either of those circumstances into account. The standard "rent under this section is to be 'the rent' at which the house "was last 'let' before September 1, 1939, with no qualification "whatever, and with no discretion given to the judge to "consider the terms and circumstances of that last letting, "or even its date." That very strong language indicates the view which the Lords Justices took of the meaning of the word "rent" in this Act for this purpose.

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(1) [1943] K. B. 332, 333.

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Chamberlain v. *Farr* (1) is even more in favour of the tenant's contention. There the tenant had entered into an agreement for buying premises, No. 1, Falling Lane, Yiewsley, which were then in the course of construction. Completion was to take place on August 7, and the vendor undertook to complete and finish them by that date. Clause 7 of the agreement provided that if the vendor should allow the purchaser to occupy the property before the completion of the purchase, the purchaser agreed that the occupation was to be a tenancy at will at 17*s*. 6*d*. The house was not in a condition for completion and occupation on the date fixed, and it was impossible for the purchaser to go into occupation so as to bring that clause into operation. Instead, an arrangement was come to under which he went into possession of No. 7 in the same road—a 1939 Act house—and agreed to pay a rent of 12*s*. a week. The question was whether the 12*s*. a week which he agreed to pay in those particular circumstances for No. 7 was or was not to be regarded as the standard rent. Lord Greene M.R. said (2): "We, therefore, have this position. Here is a tenancy and "here is a rent of 12*s*. a week. There is no question about that. "It would appear on those facts that 12*s*. is the rent at which "the dwelling-house was let on September 1, 1939, within the "meaning of s. 6. But it was argued that this rent cannot be "regarded as a rent contemplated by that section, because, "it was contended, it was not a full economic rent, and the "parties must have contemplated that, sooner or later, it would "be raised to an economic figure. It is said that that is really "what the registrar, and after him the deputy county court "judge, meant in their judgments. With regard to this it "would be sufficient to say that there is no evidence whatever "to support that contention. But I go further, and I say that, "even if there had been an arrangement or understanding that "this was not a full economic rent, it would not have displaced "the operation of the relevant words of s. 6, because, whether "it was an economic rent or whether it was not, whether the "parties did or did not contemplate that it might thereafter "be raised, it was in fact the rent at which the dwelling-house "was let on the relevant date. Once there is sufficient evidence "(and on this basis there clearly was sufficient evidence) to "enable the court to ascertain that rent, the court is precluded, "and admittedly precluded, from having regard to the "standard rents of similar dwelling-houses in the neighbourhood

(1) 112 L. J. (K. B.) 206. (2) Ibid. 207, 208.

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"for the purpose of determining the standard rent of the house "in question. Of course" (and, I think the following words important) "in cases where the rent which is in fact paid under "a lease is to a particular extent below an economic rent, there "is provision in s. 12, sub-s. 7, of the Increase of Rent and "Mortgage Interest (Restrictions) Act, 1920, for dealing with "the case. In such a case, which is where the rent payable is "less than two-thirds of the rateable value, the Act is to apply "as if the tenancy did not exist. Therefore, there is ample "provision for cases of non-economic rents, where they fall "below the stated figure mentioned in that sub-section. It is "not suggested that that sub-section applies to the present "case."

Those authorities, I think, strongly support the view that, provided that there is a rent which is a real one and not a sham, the fact that it does not come up to the true economic rent which might be recovered for the premises, or the fact that it has been reduced for family reasons or preference for a particular tenant, is a matter which must be excluded from the purview of the court in fixing the standard rent.

The two principal authorities relied on for the corporation are, I think, clearly distinguishable from the facts of the present case. The case primarily relied on was *Roberts* v. *Jones* (1). There a dwelling-house, which had been reconstructed with the aid of a grant made under the Housing (Rural Works) Act, 1926, had been let in 1938 to a tenant at 7*s*. 6*d*. a week, that being the rent fixed by the local authority in accordance with the conditions imposed by that Act. In 1941 the house became unoccupied, and later in the same year the landlord let it to another tenant at 17*s*. 6*d*. a week and repaid the grant. Thereupon the Act of 1926 ceased to apply to the house, which became subject to the Rent Restriction Acts. The question was whether the standard rent was the 17*s*. 6*d*. for which it was let after it had been taken out of the purview of these Acts. The headnote (in the Law Reports) states: "Held, that the standard rent was the rent at which the house "was first let after being freed from the restrictions of the "Housing (Rural Workers) Act, 1926, namely, 17*s*. 6*d*. a "week." Scott L.J. said (2): "The standard rent provisions "of the Rent Restriction Acts prima facie do not apply to "houses the rent of which is subject to different and special "legislation." Earlier in his judgment (3) the Lord Justice

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(1) [1947] K. B. 221.
(2) Ibid. 225.
(3) Ibid. 224.

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had said: "There is, therefore, no question of going back to "see what was the rent when the old house, which ex hypothesi "had ceased to exist, was let at a half-a-crown a week. If the "house let under the Housing (Rural Workers) Acts at 7*s.* 6*d.* "is to be regarded, 7*s.* 6*d.* is the criterion; but, if the Rent "Restriction Acts refer only to the rent of a dwelling-house "which at the time of the rent being first paid was a free "house, so that the rent would prima facie afford a fair market "criterion of the rental value of the house, then the court can "have no regard at all to the time when the rent was 7*s.* 6*d.*, "for the house was not then free and its rent cannot be the "standard. In that case it must have regard to the rent of "17*s.* 6*d.*, which was the first rent of this house freely agreed "between landlord and tenant, after the time when this house, "a new house, became free from the restrictions of the Housing "(Rural Workers) Acts." The Lord Justice goes on to discuss those Acts and comes to the conclusion summarized in the headnote. I find nothing in that judgment which in my view conflicts with the decisions in *Davies* v. *Warwick* (1) and *Chamberlain* v. *Farr* (2). The mere fact that the Lord Justice says "dwelling-house which at the time of the rent being first "paid was a free house, so that the rent would prima facie "afford a fair market criterion of the rental value of the "house," and indicates that in his view that was the foundation for the policy of the Rent Acts in fixing the standard rent in a certain way, is, in my view, no authority for the proposition that the court, in fixing a standard rent, has any business to disregard a contract actually arrived at between the parties, and substitute for that which they have arrived at some fresh rent based upon the view of the real economic value of the premises. I think that it would be stretching the language of the Lord Justice, and also that of Somervell L.J. in his judgment, far beyond anything which they intended, to attribute that meaning to what they said. It is quite true that, in arriving at their decision and explaining the working of the Act, they used expressions referring to the fair market value of the rent, and to the effect of legislation depressing that value: but there is nothing in that case which, I think, can be relied upon as authority for an entirely novel proposition that the function of the county court judge is to ascertain the real economic rent as distinct from the contractual rent at which the parties have arrived. For these reasons I think that this appeal

(1) [1943] K. B. 329.

(2) 112 L. J. (K. B.) 206.

succeeds, and that there must be a declaration that the standard rent of these premises is 50*l.*, and not 120*l.*, a year.

SOMERVELL L.J. I agree. I thought that Mr. Heathcote-Williams was inclined to agree that if the position were that a low rent was accepted by the corporation because German had voluntarily in the past been useful to Newstead Abbey, and had given them an assurance, again on a voluntary basis, that he was prepared to go on in that way in future, the case would be covered by *Chamberlain* v. *Farr* (1), and that he could not succeed. I do not know whether I was right in that or not, but I am quite satisfied myself, for the reasons that have been given by Tucker L.J., that if that was the position—that the corporation were accepting the figure of 50*l.* that had been put forward by German, although less than the economic rent, that would be covered by what Lord Greene M.R., said in *Chamberlain* v. *Farr* (1).

Certainly the main part of Mr. Heathcote-Williams' argument was based on the submission that there was evidence on which the county court judge could find that German had put himself under a contractual liability to continue to do what he had been doing, and to look after the property ; and, a second proposition necessary, I think, to put his submission on its legs, namely, that that undertaking was part of the consideration for the use and occupation of this house.

It seems to me that in a case like this, where there is a lease—a document which purports to set out what is the consideration for the use and occupation of a house—at the least unambiguous evidence is necessary if a court is to be entitled to find and to hold that there was some other consideration for the use and occupation in addition to that expressed in the document. I do not myself propose to recapitulate the evidence, in both the correspondence and the judge's note, but, in my opinion, there is no unambiguous evidence on which the judge could find both that there was a legal obligation to do this work, and that the assumption of that legal obligation was consideration additional to the rent as set out for the use and occupation of the house. For those reasons, I think that the appeal succeeds.

If Mr. Heathcote-Williams had been successful on those two points, or if, to put it another way, the court were confronted with a lease which itself, on the face of it, showed, in addition to the rent, some further consideration which could be evaluated in money, then, in my view, a different question would be raised which can be determined when it arises.

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(1) 112 L. J. (K. B.) 206.

With regard to the authorities, again I agree with what has been said by Tucker L.J. I think it possible that some of the examples given by Scott L.J. and MacKinnon L.J., in *Davies* v. *Warwick* (1) went beyond what was necessary for the decision of that case, and may raise questions on which I would like to hear argument before coming to a definite opinion. I think, in particular, with respect to the Lords Justices, that, in the examples which both of them gave of a purely nominal rent, they may not have had in mind s. 12, sub-s. 7, of the Rent Restriction Act of 1920, which is referred to by Lord Greene M.R. in *Chamberlain* v. *Farr* (2).

COHEN L.J. I also agree with the order proposed by my brother Tucker. I only desire to add a word on one point: as I understand the judgment of the county court judge, he based his decision on this passage in the judgment of Scott L.J. in *Roberts* v. *Jones* (3) "If the Rent Restriction Acts refer "only to the rent of a dwelling-house which at the time of the "rent being first paid was a free house, so that the rent would "prima facie afford a fair market criterion of the rental value "of the house, then the court can have no regard at all to the "time when the rent was 7*s.* 6*d.*, for the house was not then "free and its rent cannot be the standard." The county court judge appears to have understood Scott L.J. as having laid down that, in any case where there was evidence to indicate that the fixed rent was not a fair market criterion, the court could have no regard at all to that rent and must disregard it. He says: "It seems to me that as you can look to statute, so "equally you can look to other matters. As between the "two parties they were ignoring fair market value of the "property and dealing with it as part and parcel of a bigger "thing." If that were the true interpretation of the observations of Scott L.J., they would, I think, be inconsistent with the decision of this court in *Chamberlain* v. *Farr* (2); but I do not so understand the observations: I think that Scott L.J. was clearly saying that, where it is found that the rent was not fixed by agreement between the parties but was imposed under a statutory provision, then it cannot be said to be a fair market criterion of the rental value of the house. That that was his

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(1) [1943] K. B. 329.
(2) 112 L. J. (K. B.) 206.
(3) [1947] K. B. 221, 224.

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real meaning is, I think, clear from other passages in his judgment. On that view, there is nothing inconsistent between *Roberts* v. *Jones* (1) and *Chamberlain* v. *Farr* (2). In my view, on the facts of this case, we are compelled by the decision in *Chamberlain* v. *Farr* (2) to hold that the county court judge was wrong, and that the standard rent is, as my Lord has said, 50*l.* a year.

Appeal allowed.

Solicitors for the tenant: *Torr & Co., for Harrop White, Gamble & Vallance, Mansfield.*

Solicitors for the landlords: *Sharpe, Pritchard & Co., for the Town Clerk, Nottingham.*

(1) [1947] K. B. 221, 224. (2) 112 L. J. (K. B.) 206.

R. C. C.

C. A.
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July 27, 28, 30.
Tucker, Bucknill and Somervell L.JJ.

AMPHLETT *v.* DORRELL.

Landlord and tenant—Rent restriction—Apportionment of rateable value—Property comprising principal house and lodge—Application by tenant of whole property—Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 & 11 *Geo.* 5, *c.* 17) *s.* 12, *sub-s.* 3.

By a lease made in 1941 a landlord let to a tenant at a rent of 200*l.* a year for three years a property consisting of a mansion and a lodge, the latter already sub-let at a rent of 104*l.* a year. The rateable value of the whole property was 80*l.* a year, and it had always been assessed as a whole. The property as a whole was outside the Rent Restriction Acts by virtue of its rateable value and the rent reserved by the lease. On appeal by the landlord from an order of the county court judge made on the tenant's application under s. 12, sub-s. 3, whereby he apportioned the rateable value as to 63*l.* to the mansion and as to 17*l.* to the lodge and fixed the standard rents at the agreed figures of 70*l.* and 20*l.* respectively:—

Held, that s. 12, sub-s. 3, was inapplicable to such a case, where the application was by the tenant of the whole property in respect of which the apportionment was sought; for it was not "necessary" to make the apportionments, since the rent and rateable value of the property were already fixed as between landlord and tenant by the lease and the valuation list respectively, and since the apportionment, even if made, would not bring either the mansion or the lodge within the Rent Restriction Acts inasmuch as the rent and the rateable value of the whole of the demised premises would remain the sum of the two apportioned figures.

Rider v. *Rollit* (1920) 36 T. L. R. 687 applied.

Langford Property Co. Ld. v. *Goldrich* [1948] 2 K. B. 423, approved.

Upsons, Ld. v. *Herne* [1946] K. B. 591 distinguished.

APPEAL from Worcester county court.

By a lease dated July 31, 1946, the landlord, Mrs. Mary Blackford Amphlett, let to the tenant, Geoffrey James Dorrell, for three years at 200*l.* a year, a house called The Cedars, with a lodge, outbuildings and a garden, subject to a sub-tenancy of the lodge at 104*l.* a year which had been granted previously. The lease was stated to include " All the property " comprised in and demised by the head lease the principal " house erected thereon being now known as The Cedars " together with lodge and outbuildings and gardens subject " none the less to but with benefit of a sub-tenancy of the lodge " . . . . granted . . . . by the previous tenant of The Cedars " at 104*l.* a year." The tenant applied to the county court under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), to apportion the rateable value of the property between the principal house and the lodge.

The county court judge rejected the contentions for the landlord that the court had no jurisdiction to apportion because the tenant held one undivided holding at an entire rent comprising both The Cedars and the lodge and that the tenant could not himself split up the holding by asking for a subdivision of rent or apportionment of rateable value which would bring him within the benefits of the Rent Restriction Acts. He therefore made the following declaration, after the parties had agreed the figures for the standard rent in the event of the judge's making an apportionment of the rateable value as a result of which the properties would come within the Rent Restriction Acts. " On the application of the tenant Geoffrey " James Dorrell and upon hearing Mr. T. Tempest Dineen " of counsel for the tenant and Mr. Michael Browne of counsel

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3 : " Where, for " the purpose of determining the " standard rent or rateable value " of any dwelling-house to which " this Act applies, it is necessary " to apportion the rent at the date " in relation to which the standard " rent is to be fixed, or the rateable " value of the property in which " that dwelling-house is comprised, the county court may, on " application by either party, " make such apportionment as " seems just, and the decision of " the court as to the amount to be " apportioned to the dwelling-" house shall be final and " conclusive."

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"for the landlord this court for the purpose of ascertaining "whether the above-mentioned Acts apply to The Cedars "demised to the tenant by a lease dated July 31, 1946, and "made between the landlord of the one part and the tenant of "the other part and comprising the following premises, namely, "The Cedars and the lodge, and for the purpose of determining the respective standard rents of the said premises "doth pursuant to the above-mentioned Acts (1.) declare that "the rateable value of the said property on April 1, 1939, shall "be apportioned between the said premises as follows, namely, "63*l.* to The Cedars and 17*l.* to the lodge; (2.) declare that by "reason of the foregoing declaration the above-mentioned Acts "apply to the said property and that the rent at which the "said property was let on September 1, 1939, shall be apportioned between the said premises as follows, namely, 70*l.* to "The Cedars and 20*l.* to the lodge." There followed an order as to costs. The landlord appealed.

Michael Browne for the landlord. There is no reported case in which the tenant of a whole property, let as one property by the lease, has sought to operate s. 12, sub-s. 3. In every case where an apportionment has been made under the subsection it has been "necessary" to make it, as the sub-section requires. There is no such necessity here. Section 12, sub-s. 3, has no application to a case of this kind. The applicant is the tenant of the entire property, yet he is seeking to divide it into its component parts. There is not here that necessity which exists once a property has been split up into separate parts. There is no need here to find out the respective rateable values of the mansion and the lodge. In *Rider* v. *Rollit* (1) and *Langford Property Co. Ld.* v. *Goldrich* (2) a tenant failed in his endeavour to split his holding into two parts for the purpose of bringing them within the Rent Restriction Acts. The person seeking apportionment must be the tenant of a part only of the property in respect of which the apportionment is desired. That was the case in *Upsons, Ld.* v. *Herne* (3), which is distinguishable. This whole property used to be let to a tenant without any sub-tenancy of the lodge. It is conceded by the respondent tenant here that if he has a right to apply under s. 12, sub-s. 3, so had that first tenant. To say that that tenant, who held the whole property as one, with no part of it sub-let, can apply under s. 12, sub-s. 3, is to go far beyond any

(1) (1920) 36 T. L. R. 687.
(2) [1948] 2 K. B. 423.
(3) [1946] K. B. 591.

reported case. The words "by either party" in the subsection refer to landlord or tenant of any component part of the property. The only thing which it might be "necessary" to determine is the rateable value of the lodge, in order that the standard rent of it might be ascertained since it is sub-let separately. The Cedars itself is not let separately, and is not subject to any such necessity. The tenant can apply for apportionment with a view to charging his sub-tenant the proper rent for the lodge, but he cannot so apply vis-à-vis his own landlord and in respect of The Cedars which is not let separately from the lodge.

Smallwood for the tenant. The words "either party" in s. 12, sub-s. 3, cover the tenant here as tenant of the landlord or as himself landlord of the sub-tenant. An application by him under the sub-section is therefore perfectly proper. *Upsons, Ld.* v. *Herne* (1) would seem to conclude this case in the tenant's favour. There the tenant of a flat which formed part of a building comprising two flats and a shop succeeded in having an apportionment of the rent though the flat in question was held under the same lease as the other flat and the shop. Here The Cedars and the lodge were originally let to one tenant under one lease without any sub-tenancy of the lodge in existence. The lease to the present tenant is expressed to be subject to the sub-tenancy. It provides for vacant possession of the lodge only, and thus recognizes that there are two separate dwelling-houses. [*Upsons, Ld.* v. *Herne* (2) referred to. SOMERVELL L.J. referred to *Sutton* v. *Begley* (3) on the question of necessity to apportion.] It would surely be unfair that the sub-tenant should be able, as tenant of one of the component parts, to apply for an apportionment but that the tenant should be unable to pass the apportionment on as between himself and the landlord.

Browne was not called on to reply.

Cur. adv. vult.

July 30. The following judgments were read.

TUCKER L.J. The county court judge, in his judgment, said: "It is quite clear from the terms of the lease itself that two "individual houses were being let, namely, The Cedars and the "lodge, which was subject to a sub-tenancy. The tenant now

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(1) [1946] K. B. 591.
(2) Ibid. 594.
(3) [1923] 2 K. B. 694.

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" comes before the court and asks the court to apportion the " rateable value of these premises which he holds under this " lease. I cannot help commenting on the fact that one of the " covenants in the lease under his hand and deed in which he " entered was this, ' not at any time during the term, to make " ' any application for any division of the rateable assessment " ' of the premises into more than one assessment as it is now " ' made.' In spite of that he comes to the court and asks the " court to make this assessment. He has taken advantage of " the Rent Acts. It is obviously made with the intention of " benefiting himself, but if the Acts allow him to get an apportionment made by this court then he is entitled to ask the " court to act accordingly. There is one rateable value—80*l.* " for the whole of these premises comprising both The Cedars " itself and the lodge. There has never been a separate " assessment of the two properties and under those circumstances the tenant comes here to ask the court to apportion " the whole assessment between these two properties. " Fortunately the court is not troubled by any figures, but the " point that is at issue is whether the tenant has any right to " ask the court for this to be done." The judge read s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and proceeded: " Since that Act " was passed there have been many cases dealing with the words " ' dwelling-house to which this Act applies.' It is obvious " that they have to be read in accordance with the more recent " decisions. In other words, s. 12, sub-s. 3, must now be read " as giving power to apportion even where the dwelling-house " is on the face of it not within the Acts. The effect seems to " be this, that, whether the property is prima facie one to which " the Acts apply or not, the court has a duty to apportion either " the rent or, if necessary, the rateable value. It is contended " by Mr. Michael Browne that, in spite of the decisions which " have been referred to, nevertheless the court has no jurisdiction to apportion, because the tenant had a tenancy of " one undivided holding, at an entire rent, which comprised " both The Cedars and the lodge, and that he cannot himself " split up the holding and come to the court and ask the court " to sub-divide the rent, or to apportion the rateable value in " such a way as to entitle him to say that he comes within " the Act." The judge then referred to *Rider* v. *Rollit* (1) and *Upsons, Ld.* v. *Herne* (2), and proceeded: " It seems that

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(1) 36 T. L. R. 687.

(2) [1946] K. B. 591.

"the present position is that either the landlord or the tenant "can come to the court, even when two properties are comprised "in one letting, even when the rent in the head lease is far "outside the rent which would bring the house within the Act, "and that the landlord or tenant can come to this court and "ask the court to make an apportionment. With regret I "conclude that the tenant is entitled to have the apportion-"ments made." He then proceeded to make the apportionments set out in the declaration, the figures with regard to which had been agreed.

The question at issue turns on the proper construction of s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. This difficult sub-section has been the subject of numerous decisions, but no case has been cited to us in which the tenant of the whole comprising premises has ever claimed against his landlord to have an apportionment of its separate component parts. In all the cases the tenant applying for apportionment has at the material time been a tenant of one of the component parts of a larger comprising whole. In my view, the short answer to the present problem is to be found in the words " where . . . . it is necessary to "apportion the rent . . . . or the rateable value." In the present case it appears to me to be quite unnecessary to apportion either the rent or the rateable value of the whole property, for, as between the landlord and the tenant, they are already fixed—the rent by the terms of the lease and the rateable value by the entry in the ratebook—at figures in excess of the limits prescribed by the Act of 1920. Even if an apportionment is made it will not result in bringing either The Cedars or the lodge within the Acts, since the rent and rateable value of the whole demised premises will remain the sum of the two apportioned figures : this is the result of the decision in *Rider* v. *Rollit* (1), and also accords with the view recently expressed by Birkett J. in *Langford Property Company, Ld.* v. *Goldrich* (2).

The headnote to *Rider* v. *Rollit* (1) is as follows : " Where "there is one letting of two flats at one entire rent, the letting "is not divisible so as to bring each of the flats within the limit "of rent below which dwelling-houses are brought within the "Increase of Rent and Mortgage Interest (War Restrictions) "Acts." Lush J., in giving judgment said : " This case "raises a question of novelty and of some difficulty. The "defendant is the tenant of two suites of bachelor chambers,

(1) 36 T. L. R. 687.

(2) [1948] 2 K. B. 423.

"under an agreement dated April 16, 1918. He has been "there a good many years. He first had the lower suite in "1904 and the upper suite he took, as he says, with the object "(as the plaintiff knew) of sub-letting. In the 1912 agreement "there was clearly a letting of the whole at one rent of 104*l*. "In 1918 the rent was raised to 130*l*. There was an agreement "not to under-let without the plaintiff's consent. At the "present time the upper floor is vacant. Prima facie the Acts "do not apply, for the rent of the two floors together considerably exceeds the limit mentioned in the Acts. The "rateable value also exceeds the limit. But the defendant "says that these are two separate dwelling-houses, each of "which is below the limit, and that it is not a letting of one "suite of rooms, but two lettings of two sets. I do not think "that it is possible here to say that there were two separate "lettings. It was one letting at one entire rent, which issues "out of every part of the premises."

In *Langford Property Company, Ld.* v. *Goldrich* (1) on March 24, 1940, the valuation list which reduced the rateable value of one flat, No. 13, from 98*l*. to 54*l*. reduced the rateable value of another flat, No. 15, from 92*l*. to 52*l*., in each case retrospectively as from April 1, 1939. These two flats had been let to the defendant by an agreement of July 1, 1941, at a rent of 300*l*. a year, which by subsequent agreements had been increased to 525*l*. a year. Birkett J. held that the combination of the two flats did not constitute a separate dwelling-house, but went on to hold that if the combination of the two flats in that case did constitute a separate dwelling-house within the meaning of s. 16, sub-s. 1, then, having regard to s. 7 of the Act of 1939, the court must look at the valuation list in force on April 6, 1939, in order to ascertain the rateable value. The flats were not first assessed after that date, and the valuation list showed that on that date their respective assessments stood at 54*l*. and 52*l*., a total of 106*l*. Accordingly, the rateable value of the two flats, even when treated as constituting together a single separate dwelling-house, was over 100*l*. It followed that they are not controlled by the Rent Acts.

These decisions, with which I respectfully agree, do not in my view in any way conflict with the decision of this court in *Upsons, Ld.* v. *Herne* (2), where the apportionment was made in favour of the tenant of flat 2A, which was one of the

(1) [1948] 2 K. B. 423. (2) [1946] K. B. 591.

component parts of the comprising property which consisted of flat 2A, flat 2B and a shop. This court decided that flat 2A was first let when it was let together with 2B and the shop in 1911, and not when it was first let separately in 1925. I can find nothing in the judgments to suggest that if at the material date the tenant had held all three properties under a lease from the landlord he could have obtained an apportionment of the entire rent between the different parts of the demised premises. In my view, s. 12, sub-s. 3, is wholly inapplicable to a case such as this, and there was no jurisdiction in the county court to apportion on the application of the tenant of the whole comprising property. I think that this appeal should be allowed and the declaration set aside.

BUCKNILL L.J. I agree.

SOMERVELL L.J. In all the cases to which we were referred the tenant applicant was tenant of a dwelling-house forming part of the property covered by the assessment or rent which he was seeking to have apportioned, and was not tenant of the remainder. In such a case it is clearly necessary to apportion in order to discover the rateable value of that of which he is tenant. Section 12, sub-s. 3, of the Act of 1920 also contemplates that the standard rent may be an apportioned amount of a larger rent covering other property. When this is so, it is equally necessary to apportion in order to discover the standard rent of the dwelling-house.

The present case is quite different: the tenant here is and will remain during the period of his tenancy tenant of property which, it is agreed, is as a whole outside the Acts. It contains two houses, the big house and the lodge. He seeks, first of all, to have the rateable value apportioned between the big house and the lodge. As between him and his landlord, however, this seems to me irrelevant. This, of course, is a first step in order to get the court to fix standard rents of the two houses based on an apportionment of the rent payable on September 1, 1939. He then claims that the rent which he has to pay for the whole property is the sum of these two standard rents as so fixed. The two rents so added together will come, of course, to the rent payable on September 1, 1939. The result is plain: although the property of which he took a lease was outside the Acts, he is claiming to be treated in the same way as if it were inside the Acts, and to pay no more than the rent payable on September 1, 1939, with, of course, additions, if any, to the standard rent allowable under the provisions of the Acts.

I can find no justification in the words of s. 12, sub-s. 3, for this procedure. Counsel for the tenant relied on the words "by either party." These words, I think, mean that in the normal case such as those which have come before the courts either landlord or tenant can apply: a landlord who was splitting up premises previously let as one dwelling-house into two or more dwelling-houses might wish to know the proportions in which the original rent should be apportioned.

Counsel for the tenant also relied on the hardship which, he submitted, would arise if the sub-lessee of the lodge applied as against the tenant for an apportionment of rateable value which would, it seems, clearly bring the lodge within the Acts: he would then apply to have his standard rent based on an apportioned amount of the rent payable for the whole property on September 1, 1939. This would be very much less than the 104*l.* in the expectation of receiving which from the sub-tenant the tenant agreed to pay 200*l.* Assuming that the sub-tenant would succeed in such an application, one answer to the argument is that if a man becomes tenant of property part of which is sub-leased he becomes sub-lessor subject to any statutory rights which the sub-tenants may have under these or any other statutes. It is unnecessary to consider whether, if the sub-tenant succeeded in reducing his rent below the sum named in the lease with which we are concerned, the tenant would have any rights under the lease: if at the time when a lease was negotiated it were realized that sub-tenants might successfully claim to reduce their rents, an express provision could be inserted providing for a pro tanto reduction of the rent payable by the tenant.

The county court judge, I think, was wrong in regarding *Rider* v. *Rollit* (1) as overruled by later cases. There was not an application for apportionment there, but if the county court judge were right here, s. 12, sub-s. 3, could be used to enable a tenant to effect what he was held unable to do in that case.

Counsel for the tenant relied particularly on *Upsons, Ld.* v. *Herne* (2). That case does not seem to me to throw any light on the present problem. It was a case of the type contemplated by s. 12, sub-s. 3, in which the tenant applicant was tenant of part only of the property covered by the rent which he was

(1) 36 T. L. R. 687.

(2) [1946] K. B. 591.

seeking to have apportioned. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the landlord: *Robbins, Olivey & Lake, for Curtler & Son, Worcester.*

Solicitors for the tenant: *Peacock & Goddard, for Hulme & Parry, Worcester.*

R. C. C.

C. A.
1948
Oct. 25, 26, 27.
Lord Goddard C.J., Asquith and Singleton L.JJ.

SHARP *v.* COATES.

Land charge—Registration—Estate contract—Estate owner—Agreement by tenant from year to year to grant sub-tenancy from year to year—Proviso in agreement that if grantor acquired superior freehold reversion he would grant ten years' lease—Non-registration as land charge—Whether failure to register made proviso void as against subsequent purchaser of fee simple for value—Land Charges Act, 1925 (15 *Geo.* 5, *c.* 22), *s.* 10, *sub-s.* 1, *Class C* (*IV*), *sub-s.* 2, *s.* 13, *sub-s.* 2.

On April 13, 1944, by a written agreement R., who was in possession of a piece of arable and orchard land as tenant from year to year, granted a sub-tenancy thereof from year to year to C. In the agreement was a proviso that R. would grant a ten years' lease of the land from October 11, 1943, in the event at any time during the continuance of the agreement of the [superior freehold] reversion becoming absolutely vested in him. Neither the written agreement nor the proviso was registered as a land charge under the Land Charges Act, 1925. In April, 1945, after the death of R.'s mother, who had been tenant in fee simple of the land, R. became tenant in fee simple. On December 11, 1945, R. sold the land in fee simple to S. with notice of C.'s tenancy. In September, 1946, S. gave to C. notice to quit on or before October 11, 1947. C. refused to give up possession on the expiration of the notice and contended that he was entitled to remain in possession until the termination of the ten-year term in accordance with the proviso in the agreement of April 13, 1944.

Held that as on April 13, 1944, the date of the agreement, R. was tenant from year to year of the land, he was an "estate owner" within the meaning of s. 10, sub-s. 1, Class C (IV) of the Land Charges Act, 1925, because the expression "estate owner" within that meaning included a tenant from year to year under the combined operation of s. 1 (*b*) and s. 205, sub-s. 1 (xxvii.), of the

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

Law of Property Act, 1925. Accordingly, the unregistered agreement of April 13,1944 and proviso on which C. relied was void as against S., a purchaser for value of the fee simple, by reason of the operation of s. 13, sub-s. 2, of that Act, and S. was entitled to possession.

APPEAL from Humphreys J.

On April 13, 1944, one Walter Henry Racey, who was a tenant from year to year of some arable and orchard land, granted a tenancy thereof from year to year to the defendant. It was a tenancy of something over three acres of land, which formed part of a larger holding, and at the time of the letting Racey's mother was the owner in fee of the whole property. The agreement contained the following proviso : " In the event at any " time during the continuance of this agreement the reversion " expectant upon this agreement becoming absolutely vested " in the landlord the landlord will grant to the tenant a lease " for a term of ten years as from the 11th day of October, " 1943, upon the terms of this agreement so far as the same are " applicable to a lease." Mrs. Racey died in December, 1944, and on April 29, 1945, the property was conveyed by her executors to Walter Henry Racey, who thereupon became the owner of the fee. The defendant thereupon became entitled to demand a lease for ten years, but he did not do so. On November 13, 1945, the plaintiff contracted to buy the property from Racey, and the purchase was completed on December 11, 1945. The defendant, meanwhile, had remained as a tenant from year to year. On September 13, 1946, the plaintiff served a notice to quit on the defendant, who then set up that he was entitled under the terms of the written agreement under which he was holding from year to year to demand a lease for ten years. The answer of the plaintiff to that claim was that that proviso in the written agreement was a contract which was caught by the provisions of s. 10, sub-s. 1, Class C (IV) (1),

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(1) Land Charges Act, 1925, s. 10, sub-s. 1 : " The following " classes of charges on, or " obligations affecting, land may " be registered as land charges " in the register of land charges, " namely : . . . . Class C . . . . iv. " Any contract by an estate owner " or by a person entitled at the " date of the contract to have a " legal estate conveyed to him or " to convey or create a legal estate " . . . . (in this Act referred to as " ' an estate contract ')."

Sub-section 2 " A land charge " shall be registered in the name " of the estate owner whose estate " is intended to be affected."

Section 13, sub-s. 2 : " A land " charge of Class B, Class C or " Class D, created or arising after " the commencement of this Act " shall (except as hereinafter pro- " vided) be void as against the of the Land Charges Act, 1925, and as that was not registered as a charge it was void as against him as a purchaser for value because of the provisions of s. 13, sub-s. 2, of the Act.

Humphreys J. upheld the plaintiff's contention and gave judgment in his favour. The defendant appealed.

L. M. Jopling for the defendant. The question for decision is what is the meaning of the words "estate owner" in s. 10, sub-s. 1, Class C (IV) of the Land Charges Act, 1925. My submission is that by reasons of the provision of sub-s. 2 of s. 10, an "estate owner" means the owner of the legal estate to be affected by the charge represented by the estate contract, and an agreement is not an "estate contract" within the meaning of Class C (IV) if it is not made between parties of whom one is the owner of the legal estate to be so affected.

In the court below counsel for the plaintiff put forward two alternative contentions. The first alternative contention was that an "estate owner" means the owner of any estate, whether or not that estate is to be affected. The second alternative contention was that even if an "estate owner" means the owner of the estate to be affected by the contract, the agreement although not an estate contract when it was made, becomes an estate contract when the person against whom the charge is to be registered becomes the owner of the estate to be affected by the contract.

"purchaser of the land charged "therewith, or of any interests "in such land, unless the land "charge is registered in the appropriate register before the completion of the purchase.

"Provided that as respects a "land charge of Class D and an "estate contract created or "entered into after the commencement of this Act, this "subsection only applies in favour "of a purchaser of a legal estate "for money or money's worth."

Law of Property Act, 1925, s. 1, sub-s. 1: "The only estates "in land which are capable of "subsisting or of being conveyed "or created at law are—(*a*) An "estate in fee simple absolute in "possession; (*b*) A term of years "absolute."

Section 205, sub-s. 1: "In this "Act unless the context otherwise "requires, the following "expressions have the meanings "hereby assigned to them, that "is to say:—(xxvii.) 'Term of "'years absolute' means a term "of years (taking effect either in "possession or in reversion "whether or not at a rent) . . . . "and either certain or liable to be "determined by notice, re-entry, "operation of law, or by a provision "for cesser on redemption, or in "any other event (other than the "dropping of a life, or the determination of a determinable life "interest); . . . . ; and in this "definition the expression 'term "'of years' includes a term for "less than a year, or for a year or "years and a fraction of a year or "from year to year."

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As regards the first contention, it amounts to an assertion that in order to satisfy the conditions of s. 10, sub-s. 1, Class C (IV), all that was necessary was that Racey should have had some legal estate in the property when the agreement was made, and as he then had a legal estate by reason of his tenancy from year to year, the tenant was bound to register the agreement if he did not want to be caught by the provisions of s. 13, sub-s. 2. I submit, however, that it is wrong to consider s. 10, sub-s. 1, Class C (IV) alone without also at the same time considering s. 10, sub-s. 2. Both provisions should be read together and the result of reading them together is to establish the principle that in order that there should be an estate contract it is essential that at the time of the agreement one of the parties should be the owner of the estate which is to be affected by the agreement. In this case the estate to be affected by the agreement was an estate in fee simple out of which the term was to be derived and as Racey was not the owner of the fee simple at the time of the agreement, it was not necessary to register a land charge against him. The legislature by s. 44, sub-s. 1, of the Law of Property Act, 1925, has provided that the devolution of the legal estate to be sold should be shown for the period of thirty years back from the date of the contract of sale. As in this case it was the fee simple which was sold on December 11, 1945, it was merely necessary to show in the abstract of title the names of the persons who successively held the fee simple during the thirty years prior to December 11, 1945.

Those persons were (1.) William Racey the husband of Mrs. M. A. Racey, (2.) Mrs. M. A. Racey, (3.) the personal representative of Mrs. M. A. Racey and (4.) W. H. Racey the son of Mrs. M. A. Racey. If any of these four persons had created any registrable land charge while he or she was owner in fee simple, that charge would have been properly the subject of registration under s. 10 of the Act of 1925. When a purchaser is investigating the title in order to be satisfied about it, it is necessary for him to search the register in order to see what charges if any have been made during the period of thirty years by the respective owners of the estate to be purchased. It could not have been the intention of the legislature to expect him to search the register for charges made during the thirty years by owners of estates which were less than the estate to be purchased. In this case the estate to be purchased was the fee simple. Therefore a purchaser could not have been expected to search for any charges except charges affecting the fee simple. If the purchaser of a fee simple was required to find out whether a mere tenant for a term of years or from year to year had registered a charge on his interest in the land, the purchaser's task would be exceedingly difficult.

In this case a purchaser of the fee simple in December, 1945, would only be expected to search against each of the four persons whom I have mentioned during the periods when they respectively were owners of the fee simple, and he would only be expected to search as against W. H. Racey from April 24, 1945, when he acquired the fee simple.

The second alternative contention of counsel for the plaintiff leads to the assertion that, at any rate, the agreement was an estate contract on April 24, 1945, the date when Racey acquired the fee simple, and therefore, it should have been registered in his name at some time between that date and the date of the sale to the plaintiff on December 11, 1945. However, as I have already submitted, the expression " estate owner " means the owner at the time when the contract was made of the estate intended to be affected. Racey was not the owner at that time of the estate to be affected because the estate to be affected was the fee simple, and he was at that time only a tenant from year to year.

Sir Andrew Clark K.C. and *Hanbury Aggs* for the plaintiff. The question is whether at any time before December 11, 1945, when the land was conveyed to the plantiff, the undertaking of Racey to grant to the defendant ten years' lease was capable of being registered as an " estate contract " under s. 10, sub-s. 1, Class C (IV) of the Land Charges Act, 1925. If it was capable of being so registered at any time before December 11, 1945, then the appeal must fail because s. 13, sub-s. 2, of the Land Charges Act, 1925, would make the proviso void as against the plaintiff, a purchaser for value, on account of its not having been so registered ; and the question whether he had express or implied notice is immaterial. The question really is one of the proper construction of s. 10, sub-s. 1, Class C (IV) of the Act and the first matter to clarify is the meaning of the words " estate owner." The argument of counsel for the defendant seeks to place a restricted meaning on those words for he first of all says that those words only mean the owner of the estate sought to be affected by the charge and he says that that estate was to be an estate in fee simple for the ten years' lease was only to be granted after Racey had acquired the fee simple.

He secondly says in effect that in any case only a charge capable of being fully satisfied out of the estate of the owner against whom it is registered is required to be registered under the Act. We submit that Racey was an "estate owner" within the statutory meaning on April 13, 1944, the date of the agreement. He was on that date a tenant from year to year, since the fact that he had granted a sub-tenancy from year to year did not operate to divest him of his own tenancy from year to year, the two terms being both of uncertain duration and therefore not co-extensive. The expression "estate owner" as defined by s. 1, sub-s. 1, of the Law of Property Act, 1925, includes not only (*a*) a tenant in fee simple absolute in possession, but also (*b*) a tenant for a term of years absolute. By s. 205, sub-s. 1 (xxvii.), of that Act a "term of years absolute" includes a tenancy from year to year. Consequently here we have an "estate owner" within the statutory meaning who has entered into a contract to create a legal estate within the same meaning, for he has entered into a contract to grant a legal estate for a term of ten years absolute. The description of "estate owner" and "estate contract" in para. (IV) of Class C of s. 10, of the Law Charges Act, 1925, has therefore been completely satisfied. The estate contract which was thus made was capable of being registered against Racey because of the provisions of s. 10, sub-s. 1, and as it has not been registered, s. 13, sub-s. 2, makes the proviso void as against the purchaser of the fee simple for value from him.

The contention of counsel for the defendant that the words "estate owner" mean the person who owns the whole legal estate which is to be affected would really lead to a re-writing of para. (IV) of Class C. Support for such a contention is said to be provided by sub-s. 2 of s. 10; and it has been argued that that sub-section shows that an "estate owner" is a person owning at the time the charge was created an estate sufficient to have created out of it the whole of the estate which is the subject of the contract. But sub-s. 2 does not anywhere require that the charge must be capable of being fully satisfied out of the estate affected. At most what is required is that the estate should be affected by the charge. Racey's tenancy from year to year was capable of being affected by the charge. Suppose, for example that he had assigned his yearly tenancy before he acquired the fee simple; he could not then have granted the lease of ten years until he, as reversioner, after he had acquired the fee simple, had first put an end to the tenancy which he had assigned. In that case the yearly tenancy would have been affected by the proviso in the agreement to grant a ten years' lease. Admittedly in the events which happened Racey's yearly tenancy became merged in the fee simple when he acquired it, but in the case supposed no such merger would have taken place and one must consider what might have happened.

Counsel for the defendant, having attempted to re-write sub-s. 1, Class C (IV), then seeks to re-write sub-s. 2 of s. 10 of the Land Charges Act.

One reason for repudiating the contention that a charge can only be registered when it is a charge which can be wholly satisfied out of the legal estate sought to be affected is the fact that, when the charge is made by a landlord in favour of a tenant, it is impossible for the tenant to inquire into and ascertain the exact nature and extent of his landlord's title, unless the landlord is willing to give him the information. This is so because under s. 44, sub-s. 2, of the Law of Property Act, 1925, a lessee is not entitled to call for the title to the freehold. It follows that a tenant, if he wishes to be protected against a future purchaser for value is bound to register a land charge made in his favour by his landlord whatever may be the interest which the landlord holds in the land.

Alternatively, we submit that even if the agreement was not registerable as an estate contract at the date when it was entered into, it at any rate became so registerable from the time when Racey acquired the fee simple on April 24, 1945 until he sold the fee simple to Sharp on December 11, 1945. There is not the slightest doubt that between April 24, 1945 and December 11, 1945, W. H. Racey was the owner of the estate intended to be affected within the meaning of s. 10, sub-s. 2, of the Act. No registration was made even then.

L. M. Jopling replied.

LORD GODDARD C.J. Section 10 of the Land Charges Act provided: "The following classes of charges on, or "obligations affecting, land may be registered as land charges "in the register of land charges, namely"—and then come various classes and the class which is in question in this case is Class C, para. (IV): "Any contract by an estate "owner or by a person entitled at the date of the contract "to have a legal estate conveyed to him to convey or "create a legal estate"—that has to be registered. That is,

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any contract by an estate owner to create a legal estate. A term of years is a legal estate under s. 1, sub-s. 1, of the Law of Property Act, 1925. By s. 13 of the Land Charges Act it is provided that " A land charge of Class B, Class C or Class D, " created or arising after the commencement of this Act, shall " (except as hereinafter provided) be void as against a purchaser " of the land charged therewith." So if it is a land charge it ought to have been registered ; if it is not registered it is void as against the purchaser whether he had notice or not. Then by s. 20 it is provided that the expressions " estate owner," " legal estate," and so forth, have the same meaning as in the Law of Property Act, 1925. By that Act " estate owner " is defined in this way : " ' Estate owner ' means the owner of a " legal estate," and by s. 1 of the Act it is provided that " The " only estates in land which are capable of subsisting or of " being conveyed or created at law are (*a*) An estate in fee " simple absolute in possession ; (*b*) A term of years absolute." So we then look to see what the definition of " A term of years " absolute " is, and we find that in s. 205, sub-s. 1 (xxvii.), it " includes a term for less than a year, or for a year or years " and a fraction of a year or from year to year." So a tenant from year to year can be and is an estate owner because he has an estate for a term of years as defined by the Law of Property Act, 1925.

The argument for the plaintiff as put forward below, and which Humphreys J. accepted, was that Racey, in the first instance, was the estate owner, and it was said that he was an estate owner because he had a term of years—a yearly tenancy from his mother. The evidence on this point was not very satisfactory but the case in the court below proceeded on the footing that there was this interest at least in Racey, and this court feels that it is too late now to say that that matter should be further investigated. Now, if he was tenant from year to year from his mother, he was, as I have already shown by reference to the sections, an estate owner, and as an estate owner he made this contract to give the defendant a ten-year lease if and when he became the owner of the fee. In other words, it is a case in which a man who has a limited interest in land—an interest only as a tenant from year to year—contracting that when he enlarges his interest and becomes the owner in fee that he will grant a term of years.

Mr. Jopling, in the course of a very interesting argument, has said : Yes, but you must read the section to which I have referred as meaning that the estate owner must at the time of his contract have an estate out of which the charge could operate, and in support of that argument he refers to sub-s. 2 of s. 10. I think one comment that can be made upon that is that that sub-section merely directs in whose name the land charge shall be registered, but, further than that, it seems to me that if a limited owner—using the words "limited owner" in the sense I have just used them—does contract that if, during the continuance of the agreement which he has made with the other party to grant him a yearly tenancy, his interest becomes enlarged, then he will during the continuance of that agreement grant him a larger interest, he is making an agreement which affects his interest and affects him as an estate owner. If that is so, it follows that the conclusion that Humphreys J. came to was right, because he showed that no requirement has been satisfied here which ought to have been satisfied, and, therefore, the charge was void, that is to say, the contract which had ben made by Racey with Coates could not be effectual as against a purchaser for value, who was the plaintiff in this action.

Another question was raised, namely, whether if the agreement was not registerable at the time when it was made, it became registerable when Racey acquired the fee simple in 1945. In view of the conclusions I have come to, and which I have just expressed, that the man was an estate owner at the date of the contract and his estate was affected, it is not necessary to give a decision upon this second point.

For the reasons I have endeavoured to express on a not very easy point, I have come to the conclusion that Humphreys J.'s judgment was right, and that therefore the appeal must be dismissed.

ASQUITH L.J. I agree, and would only add two or three sentences. The sole question on this appeal is whether the tenancy agreement of April 13, 1944, was capable of registration If it was, then it is common ground that the appeal fails. It would be capable of registration, if at all, as an estate contract within s. 10, sub-s. 1, C (IV), of the Land Charges Act, 1925. It will be an estate contract within that provision if it is a contract within the opening words, namely, "Any contract "by an estate owner or by a person entitled at the date of the "contract to have a legal estate conveyed to him to convey or "create a legal estate." Mr. Racey certainly contracted to convey or create a legal estate, namely, a term of ten years. Was he then an estate owner within this provision? He was a tenant from year to year, and an estate owner, as defined by reference to the provisions of the Law of Property Act, 1925, includes in that designation a tenant from year to year. Therefore, if para. (IV) is read literally he is an estate owner within it, and the agreement is an estate contract and is capable of being registered. Therefore should any limitation be engrafted on the literal meaning of the terms of para. (IV)? One limitation, I apprehend, must be read in. The estate owner must have an estate of some sort in the same land in respect of which he contracts to convey, or creates an estate in favour of someone else. Hence, an owner of an estate in Whiteacre who contracts to convey or creates an estate in Blackacre would presumably not be an estate owner within the provision, but it is argued by Mr. Jopling that a further limitation should be implied, namely, that an owner of an estate in Whiteacre contracting to convey an estate also in Whiteacre which is larger than that which he himself possesses is also not an estate owner. I do not see the necessity for this implication. There is no absurdity in a contract by X, the owner of (say) a five years' term, contracting to convey a ten years' term to Y, provided that the obligation does not fall to be performed until X acquires the fee simple or some other estate large enough for a term of ten years to be carved out of it. I do not see why a person who owns an estate, namely, a term from year to year, should be any the less an estate owner because he enters into such a contract.

For these reasons, I agree with my Lord that the contract of April 13, 1944, was capable of registration, and, I think, capable of registration ab initio, and, therefore, the appeal fails.

SINGLETON L.J. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Metcalf, Copeman & Pettefar.*
Solicitors for the respondent: *Merrimans, for Fraser, Woodgate & Beall, Wisbech, Cambridgeshire.*

MUNRO *v.* WILLMOTT.

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Nov. 4, 5, 8.

Lynskey J.

Conversion — Damages — Measure — Bailor and bailee — Gratuitous storage of motor car—Sale by bailee—Agency of necessity—Emergency —Money spent on car to make it saleable—Effect on damages.

The defendant allowed the plaintiff to leave her motor car without payment in the yard of the hotel of which he was licensee and tenant. The storage was intended to be for a short time, but the car remained in the yard for several years. It became an obstacle owing to the conversion of the yard into a garage. After unsuccessful efforts to communicate with the plaintiff, as the car was in poor condition and had suffered from long exposure in the open air, the defendant spent 85*l.* in repairs to and renovation of the car to make it saleable. It was then sold at auction for 100*l.* The plaintiff sued the defendant for damages for detinue and conversion of the car, and the trial judge found that its value on the date of his judgment was 120*l.*, whereas, but for the work which the defendant had done to it, it would have been worth only some 20*l.* as scrap.

Held (1.) that, assuming, without deciding, that the doctrine of agency of necessity was applicable to goods stored in premises, the facts showed no such emergency as would have entitled the defendant to sell as an agent of necessity ; (2.) (following *Rosenthal* v. *Alderton & Sons, Ld.* [1946] K. B. 374 and *Sachs* v. *Miklos* [1948] 2 K. B. 23) that the plaintiff was entitled to damages on the basis of the value of the car on the day of judgment in the action ; but (3.) that the defendant was entitled to credit for what he had spent to render the car saleable, since the value of the car on the day of judgment included 85*l.*, the property of the defendant in the shape of work done to and materials supplied for the car.

ACTION tried by Lynskey J.

The plaintiff, Mrs. Ethel Ada Munro, was the owner of a 1933 16 h.p. S.S. Swallow motor car which, in July, 1941, had been bought for 80*l.* by her step-father, one Proctor, for her. The plaintiff and Proctor and his wife were connected with a business which involved their moving about the country. In about December, 1941, they were at Brackley, Northamptonshire, and arranged with the defendant, Willmott, the tenant and licensee of the Bell Inn, to bring to his yard their caravan, two lorries and the Swallow motor car, and to pay him 5*s.* a week for being allowed to park those vehicles there. In September, 1942, the family moved to a different part of the country. The car, owing to certain defects, could not then be moved, but was allowed by the defendant to remain there for the time being.

In the summer of 1945 the owners of the Bell Inn converted the yard, outhouses and stables of the inn into a garage for use by St. John's Ambulance Corps. The defendant, as a result of this, decided that the motor car must be moved. He made efforts through the police and otherwise to communicate with the plaintiff and the Proctors, but was unsuccessful; and, being unable to obtain instructions, he decided that it was necessary to dispose of the car. In order to make it saleable, as it was in very poor condition owing to long exposure in the open air, he had mechanical repairs costing 73*l.* 5*s.* 10*d.* executed to the car by a local garage, and himself did repainting work on it, the value of which was 12*l.* In December, 1945, the car was sold at auction at Northampton for 105*l.*, but the defendant had to pay 5*l.* to the auctioneers as their fee. In April, 1946, the plaintiff discovered that the car was no longer in the yard of the Bell Inn, and, having demanded its return, brought this action claiming damages in detinue, alternatively, for conversion.

Brassey for the plaintiff.
James Stirling for the defendant.

The argument on the question of the defendant's right to credit for the 85*l.* spent on the car sufficiently appears from the judgment.

LYNSKEY J. [having reviewed the evidence and found that the car belonged to the plaintiff, continued:]

The second point taken for the defendant is that there was no conversion or detinue of the car because he sold it as agent of necessity for the plaintiff. I have been referred to no case where the doctrine of agency of necessity has been applied to a bailment of this sort. The matter was considered in *Sachs* v. *Miklos* (1), where in his judgment Lord Goddard C.J. said, on the question of agency of necessity: "The question "arises, however, whether they had any legal right to sell that "furniture. The main contention below and, indeed, here, "and the judge so held, was that the defendants Miklos "became agents of necessity in the circumstances and, "therefore, had an implied authority to sell. Mr. Goodenday, "for the plaintiff, has satisfied me that they cannot possibly "be held to be agents of necessity. Agents of necessity, until

(1) [1948] 2 K. B. 23, 25.

"very modern times, were confined to two classes of person: "(1.) those who accepted bills of exchange for the honour "of the drawer; and (2.) masters of ships who found themselves "in foreign parts and unable to get immediate instructions from "their owners when they needed money for expenses which "had not been provided for. The master then always had "power to sell or hypothecate the ship, in some cases to dispose "of the cargo, and so forth, as an agent of necessity. Indeed, "as recently as 1895 Lord Esher in *Gwilliam* v. *Twist* (1) "expressed considerable doubt whether it was possible to "enlarge the classes of persons who could be regarded in any "circumstances as agents of necessity. The courts have not, "however, found any difficulty in applying this doctrine of "agency of necessity where a necessity, which means an emergency, arises in the case of a carrier by land. There is "no reason why, if it becomes commercially impossible, or "extraordinarily difficult, for example, in the case of a strike "or other breakdown of communications, for a carrier to "communicate with the owner of goods, he should not be "entitled to sell or dispose of them in the same way as a "master of a ship. I know, however, of no case in which "the doctrine of agency of necessity has been applied to carriers "by land except where the goods are perishable or in a somewhat similar category, that is to say, livestock, which have to "be tended, fed and watered . . . . It is, however, fairly "clear from Scrutton L.J.'s judgment in *Jebara* v. *Ottoman* "*Bank* (2) . . . . that the court should be slow to increase the "classes of those who can be looked upon as agents of necessity "in selling or disposing of other people's goods without the "authority of the owners. It is certain that they have never "been entitled to act under this doctrine of agency of necessity "unless there was a real emergency."

I am very doubtful if the doctrine of agency of necessity can be applied to a case of goods of this character and not of a perishable nature which are stored in premises in this country; but the doctrine, if applicable, can be applied only in a case of real emergency which necessitates the disposal of the goods, and to save them from destruction or damage and preserve their value for the bailor. In this case I am not satisfied that there was any emergency at all: the most that can be said for the defendant is that the motor car, after June or July, 1945, became something of an inconvenience,

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(1) [1895] 2 Q. B. 84.

(2) [1927] 2 K. B. 254, 270.

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not to himself, but to others who might be using the converted stables as garages for the use of their ambulances. There is no real evidence that there was any necessity for the defendant to dispose of the car. He may have found it inconvenient—to some degree a nuisance; but that is not an emergency which compels him to dispose of it. It could have been left where it was. I am satisfied that there was no real emergency which, if the doctrine did apply to this case, would justify the sale by the defendant of this motor car. The plaintiff is therefore entitled to recover damages for the detention or, alternatively, the conversion of the car.

The next question is the measure of these damages. The plaintiffs, relying on *Sachs* v. *Miklos* (1), which followed *Rosenthal* v. *Alderton & Sons, Ld.* (2), say that they are entitled to what the value of the motor car is to-day, and that the court should ignore the value of the car at the time of conversion and its varying values in the meantime, and ignore the fact that the defendant has spent money on the car for the purpose of making it saleable. My view is that as a result of these authorities I have to assess the value of the plaintiff's property in the car as it is. The damages to be assessed are those which the plaintiff has suffered by reason of the fact that she has been deprived of her property, or by its detention up to date.

It seems to me that, in assessing that value, I must have regard to what the defendant has spent in making the vehicle saleable; otherwise I should be taking the saleable value of something which was partly the plaintiff's property and partly that of somebody else, because of the cost of the defendant's work on and materials in the car. In my view, the statement of the law in Salmond on Torts (10th ed., p. 309), is correct: "If, on the other hand, the "property increases in value after the date of the conversion, "a distinction has to be drawn. If the increase is due to the "act of the defendant, the plaintiff has no title to it, and his "claim is limited to the original value of the chattel." *Reid* v. *Fairbanks* (3) is referred to, and the text continues: "If, "however, the subsequent increase of value is not due to the "act of the defendant, but would have occurred in any case, "even had no conversion been committed, the plaintiff is "entitled to recover it as special damage resulting from the "conversion, in addition to the original value of the property "converted: as when goods taken or detained have risen in

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(1) [1948] 2 K. B. 23.

(2) [1946] K. B. 374.

(3) (1853) 3 C. B. 692.

" value by reason of the fluctuation of the market." That is the measure of damages in conversion.

The measure of damages in detinue, it seems to me, must be similar, if not the same. At any rate, when I am asked to give damages in detinue for the value of a motor car as at to-day and when I find that a large sum of money has been spent upon it for the purpose of making it even saleable, I must take that into account in assessing what is the value of the property which the plaintiff has lost. The evidence for the plaintiff is that this car, when bought in 1933, cost 325*l.* By July, 1941, its value had fallen to 80*l.*, the actual price paid by the plaintiff's step-father for it. In November, 1945, the value of that car was about 120*l.*, and, its value to-day is 130*l.* to 140*l.* I am not sure that when I said " the value of that car " I was using the right phrase: I should have said that a car of that year and make, assuming that it was in good condition, would have had those values, apart from the value at which this car was sold for in 1941. I have first to assess the value to-day. [His Lordship considered the evidence on that question, and continued :] I assess the value of the car to-day at 120*l.*, and, in my view, the defendant ought to be given credit for producing that result. It is as a result of the 85*l.* which he spent in repairs and renewals and as a result of his own expenditure of time, labour and materials in painting and renovating the outside of the car that that price was realizable at all. If he had not spent that money, I am quite satisfied, this car would probably have realized 20*l.* to 25*l.* as scrap. The result is, I think, that the defendant is entitled to credit, not from the point of view of payment for what he has done, but in order to arrive at what is the true value of the property which the plaintiff has lost: that is to say, the car was so much improved by the defendant's expenditure on it that it realized 120*l.*, but it would not have realized anything like that amount had this money not been spent. In my view, the value of the property which the plaintiff has lost is approximately 35*l.*, and there will be judgment for her in that amount.

Judgment for the plaintiff.

Solicitors for the plaintiff: *Gibson & Weldon, for F. G. & P. M. Robinson, Ilkeston.*

Solicitors for the defendant: *Torr & Co., for Barnes & Lanham, Brackley.*

R. C. C.

C. A.

1948
June 15, 16,
17, 18;
July 13.

Tucker,
Somervell and
Cohen L.JJ.

IRELAND *v.* TAYLOR.

Landlord and tenant—Tenant's claim for compensation or new lease—Use of premises for business purposes—Prohibition of business use in head lease—" Could be let "—Effect on right to compensation—Premises " required " for occupation by landlord—Construction—Relevance of landlord's motive—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, 5.

A tenant does not lose his right to compensation for goodwill under s, 4, sub-s. 1, of the Landlord and Tenant Act, 1927, merely by reason that his immediate landlord will be prevented by a covenant in his own lease from the superior landlord from carrying on the tenant's business and enjoying the benefit of the goodwill; for the words " could be let " in the sub-section cover and include all such persons as may in fact be in a position to let at the determination of the tenancy, including for example, the superior landlord where only one day is left of the mesne landlord's term when the tenant's lease expires. Accordingly, the tenant is not to be deprived of his right to compensation because the superior landlord does not desire to appropriate the goodwill or may prevent the mesne landlord by forfeiture from enjoying it.

So *held* by TUCKER and COHEN L.JJ.

Per SOMERVELL L.J. A covenant in a head lease against use of the demised premises for business purposes cannot be relied on by a mesne landlord to defeat the tenant's claim for compensation for inherent goodwill under s. 4, sub-s. 1, unless the tribunal is satisfied beyond all reasonable doubt that it is the intention of the superior landlord to take all steps open to him to stop further breach of the restrictive covenant. In the absence, in the case in hand, of evidence of such an intention, the claim to compensation succeeded, and it was accordingly unnecessary to decide whether or not the existence of such a restrictive covenant is to be disregarded in considering whether the premises " could be let " within the meaning of s. 4, sub-s. 1. It is, however, a matter of doubt whether a landlord can, apart from any question of estoppel, be liable to pay compensation in respect of an increased rental value which he will be prevented from realizing.

Per TUCKER L.J. It may become relevant for the tribunal to consider the possible intentions of the superior landlord with regard to enforcing the restrictive covenant in the head lease when it comes to decide whether it is reasonable or good estate management to grant the tenant's application for a new lease.

A house is " required " for occupation by the landlord within the meaning of s. 5, sub-s. 3 (1.) (*b*) of the Landlord and Tenant Act, 1927, if he proves that he in fact desires possession and genuinely intends to occupy, for the landlord is, under that paragraph, the sole arbiter of his own requirements, and the word " required " is not to be construed objectively as meaning " needed " or " reasonably required."

In 1883 a house was let for a term of ninety-seven years by a lease containing a covenant that the premises should not be used for business purposes. In 1941 the lessee granted a sub-lease of the premises for three years, with an option to renew for three years which was exercised. The sub-tenant covenanted with the mesne landlord to use the house only as a private guest house with no outside indication of that use. In 1946 the sub-tenant served the mesne landlord with notice claiming compensation under s. 4, sub-s. 1 of the Landlord and Tenant Act, 1927, or, alternatively, a new lease under s. 5. The mesne landlord resisted the application on the ground, among others, that the house was " required " for occupation by himself because he wished to live there in order to resume his profession of a portrait painter. The county court judge found that that desire was a " mere whim," and that the house was accordingly not " required " within the meaning of the sub-section, that was, in the sense of needed. He found the tenant entitled to compensation as assessed by the referee, but made an order for the grant of a new lease.

Held, that the tenant was entitled to compensation for the adherent goodwill (which she had proved to exist), notwithstanding the possibility—(*per* SOMERVELL L.J.: in the absence of evidence)—that the head lessor might by forfeiture prevent further carrying on of the business on the premises, and that she was not entitled to a new lease, as the mesne landlord had shown that he genuinely intended to occupy the house himself.

Quaere, whether for the period of five years during which, under s. 4, sub-s. 1, the business must have been carried on at the premises the tenant must, in order to succeed in his claim for compensation, have been holding the premises under a single title and not, as here, under two successive leases (the point not arising for decision because not taken in the county court).

APPEAL from Wandsworth county court.

In 1883, Queen Anne's Bounty granted a lease for ninety-seven years of a house called " Heathlands," in Kew Road, London. The lease contained a covenant against use of the premises for any trade or business or for any other purpose than that of a private dwelling-house. On July 21, 1941, a Mrs. Abney, then the lessee, granted a sub-lease to the respondent, the present tenant, for a term of three years, with an option, which was exercised, to renew for three years.

The sub-lease contained a covenant by the present tenant " to use the premises as a private nursing home and/or guest " house only but with no outside indication of such usage " without the consent of the superior landlord." The house was in fact used by the tenant for the business of a home or guest house for old and infirm women. Most of them came from the neighbourhood, and the home was recommended by local doctors. On August 7, 1945, Mrs. Abney assigned the head lease to the appellants, the present landlords, who gave evidence that they had bought the head lease in order to be able to live in the house when the tenant's sub-lease expired.

On June 14, 1946, the tenant served a notice on the landlords under the Landlord and Tenant Act, 1927 (1), claiming com-

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(1) Landlord and Tenant Act, 1927, s. 4, sub-s. 1: "The tenant "of a holding to which this Part "of this Act applies shall, if a "claim for the purpose is made in "the prescribed manner—(i.) in "the case of a tenancy terminated "by notice, within one month after "the service of the notice on the "tenant; and (ii.) in any other "case, not more than thirty-six "nor less than twelve months "before the termination of the "tenancy; be entitled, at the "termination of the tenancy on "quitting the holding, to be paid "by his landlord compensation "for goodwill if he proves to the "satisfaction of the tribunal that "by reason of the carrying on by "him or his predecessors in title "at the premises of a trade or "business for a period of not less "than five years goodwill has "become attached to the premises "by reason whereof the premises "could be let at a higher rent "than they would have realized "had no such goodwill attached "thereto: Provided that . . . . "(*d*) the tribunal shall, in determining the amount of compensation for goodwill—(i.) have "regard to the intentions of the "tenant as to carrying on the trade "or business elsewhere, and may "make it a condition of its award "that the tenant shall undertake "not to carry on the trade or "business within such distance of "the premises as may be specified "in the award; and (ii.) disregard "any value which is attributable "exclusively to the situation of "the premises . . . ."

Section 5, sub-s. 1: "Where "the tenant alleges that, though "he would be entitled to compensation under the last "foregoing section, the sum which "could be awarded to him under "that section would not "compensate him for the loss of "goodwill he will suffer if he "removes to and carries on his "trade or business in other "premises, he may in lieu of "claiming such compensation, at "any time within the period "allowed for making a claim "under the said section, serve on "the landlord notice requiring a "new lease of the premises at "which the trade or business is "carried on to be granted to him."

Sub-section 2 "Where such a "notice is so served, the tribunal ". . . . may, if it considers that "the grant of a new tenancy "is in all the circumstances "reasonable, order the grant of a "new tenancy for such period "(being a term of years absolute) "not exceeding fourteen years "and on such terms as the tribunal "may determine to be proper, but "if the tribunal is precluded on "any of the grounds mentioned "in para. (*b*) of the following "sub-section from making such "an order the tribunal may award "such compensation as is provided "under the last foregoing section . . . ."

Sub-section 3: "Where the "tenant is the applicant, the grant "of a new lease under this section "shall not be deemed to be "reasonable . . . . (*b*) if the "landlord proves—(i.) that the pensation under s. 4 of the Act, and, alternatively, a new lease under s. 5. The originating summons in respect of the claim was filed on October 4, 1946, in Wandsworth county court. Paragraphs (*j*) and (*k*) of the particulars in the summons were as follows: "The [tenant] claims compensation in the sum of "2,000*l.* for goodwill which has accrued to the premises by "reason of the [tenant's] having attracted thereto a permanent "clientele of good standing which has become popular and "widely known in the district. (*k*) Alternatively, the [tenant] "claims a new lease of the premises."

On December 21 the landlords filed their answer. In it they denied that any goodwill had become attached to the premises or that it would be reasonable to grant a new lease, and they relied on the covenant in the head lease. They also alleged that they required the house for their own occupation. On the same day they gave notice of the proceedings to Queen Anne's Bounty, the head lessor, in a letter in which, after setting out the course of events, they said: "We shall be "obliged if you will inform us whether you will appear before "the tribunal or whether you have any suggestions to make "with regard to the matter. If you wish to join us in the "matter we shall let you know when the hearing before the "referee will take place." On January 8 Queen Anne's Bounty by their officer wrote to the landlords as follows: "It has been "brought to my notice that a breach of covenant of the lease "dated October 30, 1883, has been committed in that the "above-mentioned property is being used as a guest house and "not as a private dwelling-house as prescribed by the said "lease. The Governors of Queen Anne's Bounty as freeholders

"premises are required for "occupation by himself, or, where "the landlord is an individual, "for occupation by a son or "daughter of his over eighteen "years of age or . . . . (iv.) that "for any other reason the grant of "such a lease of the premises would "not be consistent with good "estate management, and for "this purpose regard shall be had "to the development of any "other property of the same "landlord: Provided that, if "the grant of a new lease is refused "by the tribunal on any such "ground as is mentioned in "para. (*b*), the tribunal may "make it a condition of refusal "that if the landlord fails to carry "out his intention within such "period as may be allowed by the "tribunal, the landlord shall pay "to the tenant such compensation "as the tribunal may fix not "exceeding the amount of the "loss which the tenant has "suffered by reason of having "been deprived of his right to the "grant of a new lease under this "section."

"are not prepared to consent to the user of this property for a "business and I must ask you to take immediate steps to "see that such breach of covenant is remedied." The business carried on by the tenant continued, and Queen Anne's Bounty took no steps to re-enter or obtain an injunction. In accordance with the procedure laid down by the Act of 1927 the matter was referred to a referee for report. The landlords and the tenant appeared and called evidence. The head lessors, though entitled to do so, did not appear.

The county court judge held the tenant entitled to compensation under s. 4 as assessed by the referee, but made an order directing the landlords to grant her a new lease. The landlords appealed.

Havers K.C. and *Hawser* for the landlords. The result of this appeal is of importance not only to the landlords, but also to their superior landlords, Queen Anne's Bounty. The claim for compensation under s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927, fails in limine, it is submitted, because, on the true construction of the sub-section, during the period of five years for which the business must have been carried on at the premises the tenant must have been holding under a single title, whereas here the tenant has held under two leases, the original of three years and a second for three years granted to her on her exercise of the option to renew given in the original.

Secondly, it is disputed by the landlords that there is any evidence that any goodwill had attached to the premises by July, 1947.

Thirdly, if any goodwill has attached, then, assuming that there were no covenant in the head lease forbidding use of the house for business purposes, there is no evidence that, by reason of that goodwill, the house could be let at a higher rent. It is, however, submitted that the restrictive covenant in the head lease cannot be left out of account. The county court judge misconstrued the words "could be let" in s. 4, sub-s. 1, apart from which his judgment shows that he overlooked that the burden of proof in that matter is on the tenant.

Finally, the judge misconstrued the word "required" in s. 5, sub-s. 3 (*b*) (i.). A landlord, it is submitted, only has to prove that he desires and intends to occupy the premises himself. If that is proved, the landlord's motive is immaterial. As for the question of goodwill, the judge failed to appreciate that the only goodwill in respect of which compensation can be awarded is adherent goodwill, that is, goodwill which does not include that attributable to the site itself, for example, such goodwill as may be due to the frequenting of the premises by certain customers because they are near their home. The tenant has to show that there is adherent goodwill of value to the landlord as enabling him to let the premises, to someone carrying on a similar business to that of the tenant, at a higher rent than that which he could obtain otherwise. The true measure of compensation is what the landlord gains, not what the tenant loses: *Whiteman Smith Motor Co., Ld.* v. *Chaplin* (1).

On the fundamental question whether these premises " could " be let at a higher rent," what the head lease does or does not allow is most material. It is sought to say that the landlords are estopped now from saying that the head lease forbids what the intermediate lease has expressly permitted the tenant to do; but estoppel can only thus apply while the existing tenancy continues: it does not arise on the grant of a new tenancy, or in respect of the question whether the mesne landlord could let to a new tenant for the same business purpose. To the question whether this house " could be let at a higher rent " because of the business which the tenant has carried on there, the answer, surely, is " no," because to carry on that business there may bring about a forfeiture of the head lease, since the head lessors have indicated that they do not want the house used for business purposes.

On the question of the meaning of the word " required " in s. 5, sub-s. 3 (*b*) (i.), it is submitted that the landlords here have established all that it is necessary for them to establish. The county court judge has described as a " whim " the landlord's desire to re-occupy his house in order to resume his profession as a portrait painter. Even were he right in saying that, it would be immaterial. The landlords have shown that they wish to occupy the house, and that they intend to do so if they can have possession. That is sufficient to make it unreasonable for the court to order the grant of a new lease, for it is not for the county court judge to inquire into the landlords' motives.

Hawser following. The claim to compensation is defeated by the fact that the tenant has held the house under two successive tenancies. There must be one tenancy extending

(1) [1934] 2 K. B. 35, 47, 48.

over the prescribed period of five years. There may be successive tenants holding under one tenancy, but there must be one title to satisfy s. 4, sub-s. 1—one term extending over the prescribed period. Successive tenancies each of less than five years will not do. Section 4, sub-s. 1, makes it clear that only one title can be relied on by the claiming tenant.

Avgherinos for the tenant. As for the meaning of the words "could be let," the court has to decide whether the premises "could be let at a higher rent" without reference to the title of the landlord. The question raised by those words is whether the rental value of the premises has been increased by the tenant's efforts. The relation of the tenant's operations to any covenants in his landlord's own head lease, that is, to his landlord's title, is immaterial.

[TUCKER L.J. "Could be let" might mean could be let by the landlord from whom the tenant is claiming compensation.]

A mesne landlord cannot be heard to answer his tenant's claim for compensation by saying that the premises could not be let, within the meaning of s. 4, sub-s. 1, because he, the mesne landlord, has himself only a reversion of one day at the expiration of the tenant's tenancy, so that he could not let them at a higher rent or at all. The fallacy of the landlords' argument on this point is that the title of the head landlord is not a matter which s. 4, sub-s. 1, concerned as it is with the relations between a tenant and his immediate landlord, contemplates.

[SOMERVELL L.J. Is there not an underlying assumption behind the words "could be let" that the premises will continue to be in the market? The attention of the head landlords here has now been called to the tenant's breach of covenant, and they are entitled to prevent any further unpermitted use of the premises.]

The submission that the increased rental value of the premises has to be considered without reference to matters affecting the immediate landlord's title finds strong support in *Whiteman Smith Motor Co., Ld.* v. *Chaplin* (1). Section 5, sub-s. 12, of the Act of 1927 (2) also lends support to the argument.

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(1) [1934] 2 K. B. 35, 40.

(2) By s. 5, sub-s. 12, of the Landlord and Tenant Act, 1927: "A new lease under this section "shall, if the landlord so requires, "contain a covenant prohibiting "the carrying on of any trade or "business . . . . prohibited by the "original lease, unless the landlord "has . . . . consented to a variation "of the original terms of the lease "in this respect."

The words " original lease " are used in that sub-section in reference to the lease which the tenant holds from his immediate landlord. A similar use of the word " original " appears in s. 15, sub-s. 1, of the Rent Restriction Act of 1920. Section 5, sub-s. 12, does not avail the landlords here, for there was no prohibition of business use of the premises in the " original " lease " between them and the tenant.

[COHEN L.J. I cannot see that the head lessors will be prevented from enforcing the restrictive covenant in the head lease because another lease is granted to this tenant permitting the forbidden use of the house.]

Support is to be found for the construction contended for of the words " could be let " in *Hudd* v. *Matthews* (1); in *Mullins* v. *Wessex Motors, Ld.* (2) it was held that, provided that there was an enhanced value in the premises, the tenant had brought himself within s. 4, sub-s. 1, and that it was immaterial whether his landlord got the benefit of it or not. Once the tenant has proved that the premises could be let at a higher rent, then, on the construction of s. 4, sub-s. 1, contended for, he has made out a prima facie case for a new lease. A subsidiary question may then arise as to the measure of compensation, which will involve considering the effect of the provisoes to the sub-section on the normal amount of compensation which the landlord would have to pay: see, for example, *Hudd* v. *Matthews* (3); but the fact that the landlord cannot take advantage of the adherent goodwill because of the covenant in the head lease should be ignored.

The question of estoppel only arises if the construction of the words " could be let " above advanced is rejected. As a result of the representation by the landlords (or their predecessor in title) that they were lawfully granting a tenancy of premises to be used for business purposes, thus conferring on the tenant all the rights which such a tenancy carries, including the right to compensation or a new lease under the Act of 1927, they are estopped from denying their liability to pay that compensation because of a provision in their own head lease that the premises shall not be used for business purposes.

[TUCKER L.J. I doubt if the representation is more than that the landlords had the right to grant the lease which they were then granting.]

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(1) [1930] 2 K. B. 197, 202.

(2) [1947] W. N. 316; 63 T. L. R. 610.

(3) [1930] 2 K. B. 197, 207.

To the argument for the landlords that the estoppel ceases with the tenancy and can, therefore, no longer be relied on after the term has expired, the answer is that the tenant's claim was made during the currency of her lease and that it is at that moment that the estoppel became effective.

Finally, as to the construction of the word "required" in s. 5, sub-s. 3 (*b*) (i.), it is submitted that it means "needed." The landlord has to prove that the premises "are required" for his occupation, not that *he requires* them. The use of the passive instead of the active makes all the difference. Elsewhere in s. 5, "requires," it may be admitted, means "desires." Used in the active it means "desires," but where used in the passive it has the meaning of needed. In *Nuthall (G. C. & E.)* (1927), *Ld.* v. *Entertainments and General Investment Corporation, Ld.* (1) Hallett J. construed the words "are required" as meaning that the landlord intends because the word "intention" is used in the proviso to s. 5, sub-s. 3; but when the legislature used the word "intention" in that proviso it was referring to something implied in the word "requirements." It does not follow that it meant requirements. The word to require includes intention as merely one of its elements.

Havers K.C. replied.

Cur. adv. vult.

July 13, 1948. The following judgments were read.

TUCKER L.J. The referee, though he heard the matter fully and reported on all issues, expressed the view that a tenant, in order to claim, must have been holding the premises for the five years required by s. 4, sub-s. 1, under a single title. Here there were two tenancies, the original of three years and the further three years by reason of the exercise of the option. This was a point open to the landlords before the county court judge. Their counsel was invited by the judge to address him on the point, but declined to do so, though, according to the judgment, he said that he would like a decision on the point. The county court judge accordingly did not determine the question, and we decided that the point had not been taken below and could not be relied on in this court.

The first point raised by the appellant landlords is that there was no evidence of adherent goodwill. I have come to the conclusion that this contention fails. Both the referee in his report and the judge in his judgment seem to me properly to have appreciated the nature of what a tenant is required to establish, namely, that the only part of the tenant's goodwill which can be the subject of compensation is the net rental value of what adheres to the premises in the sense of enuring to the benefit of the landlord in the form of increased rental value after the premises have returned into his possession: see *Clift* v. *Taylor* (1). This value can usually only be ascertained, as stated by Maugham L.J. in *Whiteman Smith Motor Co., Ld.* v. *Chaplin* (2), by an intelligent guess. If the guess is made by a witness considered by the tribunal to be honest and competent, and accepted as accurate, it is not for this court to disturb the finding even if, as is the fact in this case, some of the evidence appears to have been obtained as a result of questions put by counsel and by the referee which tended, by their leading nature, somewhat to discount the value of the answers so obtained.

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(1) [1947] 2 All E. R. 384.

I pass, therefore, to consider what is, in my view, one of the two principal issues in this case, namely, whether the premises "could be let" within the meaning of those words in s. 4, sub-s. 1. It is to be observed that this question falls to be decided under a section which is concerned only with compensation. Whether or not the existence of a covenant as to user in a head lease is a matter which should be taken into consideration in determining whether to grant a new lease under s. 5 is an entirely different matter. As was pointed out by the county court judge, the words are not "the landlord could "let" but simply "could be let." Section 4 contains no subsection equivalent to sub-s. 9 of s. 5, which extends the meaning of the word "landlord" in that section to include a superior landlord. Consequently, in s. 4 the word "landlord" has the limited meaning assigned to it by s. 25, sub-s. 1, namely, the person who under a lease is, as between himself and the tenant, for the time being entitled to the rents and profits of the demised premises payable under the lease.

The use of the word "landlord," with this limited meaning, is, it seems, purposely avoided after the words "could be let" in s. 4, sub-s. 1, leaving the words "could be let" to cover and include all such persons as may in fact be in a position to let at the determination of the tenancy, for example, the head landlord where there is only one day left of the mesne landlord's term at the end of the tenant's lease. If this is so, the words seem to me apt to cover the case where the letting which is contemplated may require the consent of some person other than the mesne landlord. I can see no reason why the tenant should be deprived of compensation for adherent goodwill merely by reason of the fact that the head landlord might not desire to appropriate the goodwill or might prevent the mesne landlord by forfeiture from enjoying it. None of these contingencies appears to me to require consideration under s. 4, sub-s. 1, which contemplates a letting for the same purpose as that for which the expiring lease has been used. I am not, of course, referring to cases where the user is " unlawful " in the sense of being in contravention of the law.

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(1) [1948] 2 K. B. 394. (2) [1934] 2 K. B. 35, 51.

A case for compensation under s. 4, sub-s. 1, was, in my opinion, established; but, as the tenant alleged, and it was not disputed, that the amount of compensation which could be awarded to her under s. 4 would not compensate her for the loss of her goodwill, she claimed the grant of a new lease under s. 5, which empowers the tribunal, subject to the provisions of that section, to order the grant of a new lease. The first requirement is that the tribunal should consider the grant of a new tenancy in all the circumstances reasonable. If the tribunal, for reasons other than those stated in s. 5, sub-s. 3 (*b*), does not consider the grant reasonable, then there is an end to the matter.

It is, I think, at this stage that it may be relevant for the tribunal to consider the attitude and intentions of the head landlord with regard to possible grounds for forfeiture arising out of a grant of a new tenancy. Similar considerations may also arise in connexion with estate management under s. 5, sub-s. 3 (*b*) (iv.). In the present case the judge has found nothing in the evidence to render the grant unreasonable, apart from s. 5, sub-s. 3 (*b*), and I think that the evidence before h m as to the attitude and intentions of Queen Anne's Bounty with regard to the breach of covenant was such that he may well have been unimpressed by it.

With regard to s. 5, sub-s. 3 (*b*) (i.), however, I think that the judge came to an erroneous decision. The evidence of the landlord was that he required possession of the house so that he might use the large lounge as a studio for portrait painting, for which purpose it was suitable by reason of its size and lighting. He was seventy years of age and desirous of resuming his profession as a portrait painter. No attack appears to have been made upon his veracity, but the judge described this wish as a "mere whim." If the landlord in fact desires possession of this house and genuinely intends to use it for this purpose, I can see no ground for saying that he does not "require" it within the meaning of s. 5, sub-s. 3 (*b*) (i.), which contains the words "the premises are required for occupation "by himself." If he required it for this purpose, then his wife who was living with him clearly also required it, apart altogether from the other reasons which she gave in evidence, some of which clearly could not be substantiated.

The referee had interpreted the word "required" as if it meant "needed," somewhat on the lines of the words "reasonably required" in the Rent Restriction Acts. The county court judge rightly rejected this construction, but appears to have interposed his own judgment as to the landlord's "requirements," whereas, in my opinion, in this part of s. 5 the landlord must be the sole arbiter of his own requirements, provided that he proves that he in fact desires possession and genuinely intends to occupy. I think that this construction is strongly supported by the use of the word "intention" in the proviso, which, it may be observed, provides a means whereby a landlord who goes back on his expressed intention can be penalized. It is also the construction accepted by Hallett J. in *Nuthall* (*G. C. & E.*) (1917), *Ld.* v. *Entertainments & General Investment Corporation, Ld.* (1). For this reason, I think that the judge's order should be varied by substituting for the order for a new lease an award of the compensation fixed by the referee.

SOMERVELL L.J. The case came on before the county court judge in November, 1947. In a full judgment he sets out the reasons for his conclusions: Queen Anne's Bounty, the head lessors, who did not appear to argue before the referee, had intervened formally, in order, we were told, to obtain a copy of the report, and their counsel appeared before the judge. I refer later in this judgment to the course which Queen Anne's Bounty have taken.

The judge found that goodwill had attached to the premises within the meaning of s. 4, sub-s. 1, of the Act of 1927. The first issue raised is whether there was any evidence on which he could so find, considering the point irrespective of any

(1) [1947] 2 All E. R. 384.

argument based on the restrictive covenant in the head lease.

The conception of goodwill under the Act is not an easy one. It was fully discussed in *Whiteman Smith Motor Co., Ld.* v. *Chaplin* (1), in judgments given by Scrutton and Maugham L.JJ., sitting as a Divisional Court. The matter has recently been considered by this court in *Clift* v. *Taylor* (2), in which the judgment of the court was delivered by Scott L.J. I will cite one sentence from that judgment (3) approving and summarizing what had been said in *Whiteman Smith Motor Co., Ld.* v. *Chaplin* (1): "Those learned judges made it quite "clear that the only part of the tenant's goodwill which is the "subject of compensation is the net rental value of what "'adheres' to the premises in the sense of enuring to the "benefit of the landlord in the form of increased rental value, "after the premises have returned into his possession."

A Mr. Warner, who had practised as a surveyor and estate agent for twenty years, gave evidence that, on the facts adduced about the tenant's building up and carrying on the business, goodwill had attached to the premises, with the result that, in his opinion, a person desiring to carry on the same business would give 220*l.* a year, whereas other persons would give 180*l.* a year, for them. On this the judge said, "That evidence was "in fact the witness's expert opinion on the very question "which the court has to decide, and I can only wish that I "personally found the approach to it so simple." I think that expert evidence of this kind is admissible. It does not, of course, bind the court, and there will often, as there was here, be conflicting evidence. It must be carefully scrutinized so as to see whether the expert is directing his mind to the goodwill with which the Act is concerned. Having read Mr. Warner's evidence, I think that it constituted some evidence of adherent goodwill. The judge then considered the matter on general grounds, and in the light of the tenant's evidence. He said: "On this point I was very much impressed by the argument of "Mr. Hawser, that this, being a business carried on with "considerable privacy and dependent to a large extent on the "personality of Mrs. Ireland, could not, by its very nature, be "adherent to the premises. In his cross-examination of "Mrs. Ireland, Mr. Hawser extracted from her a number of "answers which laid emphasis on the site value of the premises, "and on the personal connexion between herself and her

(1) [1934] 2 K. B. 35.

(2) [1948] 2 K. B. 394.

(3) Ibid. 399.

"clientèle, but in re-examination she said that 'Heathlands' "as such, as a name, had acquired a reputation. This, it "seems to me, is quite consistent with probabilities and ought "to be accepted. It does not require any stretch of imagination "to visualize someone in search of a home for an elderly and "infirm relation being told by a friend or relation of a guest "that there is such a home at 'Heathlands.' There is the "introduction, and whether the inquirer knows the name of "Mrs. Ireland or not he or she is not likely to ignore the "recommendation so long as the home is well run by its new "proprietor. It is probably true that recommendations from "doctors would be largely personal to Mrs. Ireland, but I see "no reason why recommendations from friends and relatives "of guests should not be very largely in the name of the house "rather than, or at least as well as, in the name of Mrs. Ireland."

Some criticism was directed to the fact that the answer in re-examination was in answer to a leading question. I agree, however, with the judge that it is in accordance with the probabilities, and, taking these reasons, supported, as I think they are, by Mr. Warner's evidence, I am of opinion that the landlords fail in their submission that there was no evidence to support this finding.

The next point raised was that based on the covenant in the head lease, and is formulated by the judge as follows: "The "landlords say that [the premises] could not be let at a "higher rent because by the terms of the head lease the carrying on of this business was a breach of covenant as between "the mesne landlords and the head landlord, and now that the "head landlord knows of the breach he would not permit it to "be perpetuated with a new tenant."

The judge's first reason for not accepting this submission was that, the premises having been let by the landlords' predecessor in title to the present tenant with permission to carry on this particular business, the landlords were estopped from denying that it was a lawful purpose. In the view which I take on this part of the case, it is unnecessary to decide it on this basis. The judge went on to hold that, apart from the doctrine of estoppel, the argument was not a sound one. He said: "The operative words are 'the premises could be "'let at a higher rent.' It seems to me to be quite immaterial "that they cannot be so let without the consent of the superior "landlord. Apart from that limtation, they could be so "let, and the mesne landlords might obtain the advantage by "getting a consent from their head landlord, or they might "surrender the lease to their head landlord who would pay a "higher price for the premises with an enhanced value, or they "might, and in these days very likely could, get the covenant "modified under s. 84 of the Law of Property Act, 1925. "These are possibilities to which I refer because the words "of the section are 'premises could be let' and not 'the land-"'lord could let the premises,' and I do not think there is "anything in the decision of *Hudd* v. *Matthews* (1), which is "contrary to this interpretation of the section." I am not sure what the judge's view would have been if he had been satisfied on evidence that there was no possibility of the landlord's giving his consent or that the covenant was of a kind which was unlikely to be modified under s. 84 of the Law of Property Act.

I arrive at the same conclusion as my brethren and the judge, but by a somewhat different route. In cases where a new lease is claimed, the proceedings under the Act are started before the termination of the lease. The mesne landlord has, under s. 5, sub-s. 9, to give notice of the claim to his immediate landlord. If that landlord is a mesne landlord he has to notify his immediate landlord, and so on. If no new lease is claimed, a mesne landlord who desires at the end of his lease to claim compensation from his landlord under s. 8 must notify that landlord of the claim. In a case, therefore, like the present, where a trade has been carried on in breach of a covenant in a head lease unknown to the head lessor, the head lessor will normally receive notice, as happened in the present case.

The mere fact that the trade or business is contrary to a covenant in a head lease is consistent with there having been an express or implied consent or a willingness to abstain from enforcing the covenant in futuro. Indeed, the argument as set out by the judge was based on the submission that the head landlord would not permit the breach to be perpetuated with a new tenant. It would, of course, on any view, be wrong if compensation were refused on the ground of the existence of such a covenant, there being no intention to enforce it now or in futuro.

In the present case no steps were taken by Queen Anne's Bounty, the head lessors, when their demand of January 8, 1947, that the business should be discontinued was disregarded.

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(1) [1930] 2 K. B. 197.

They could by taking the appropriate steps have enforced, or at any rate sought to enforce, their covenant. If they had obtained an injunction, no goodwill enabling the premises to be let at a higher rent on the termination of the tenancy could, as it seems to me, have attached. At the material date the business would have ceased. It is, I think, clear that the wording of s. 4, sub-s. 1 (i.) and (ii.) excludes the case of a lease terminated by a forfeiture.

In the present case the matter does not rest on the mere absence of proceedings. Queen Anne's Bounty did not, as I have stated, appear and argue or call evidence before the referee. A witness from their estates-management department called by the landlords gave evidence that it was the general policy of Queen Anne's Bounty not to allow a trade or business to be carried on in Kew Road. The following two questions and answers are, I think, important: "(Mr. Hawser): To make it quite specific, are Queen Anne's "Bounty prepared to allow the premises to be used as a guest "house for elderly ladies? (A.) I should very much doubt it, "if it is to be run on the lines of a business for profit." Then there is this question by Mr. Avgherinos: "If they"—Queen Anne's Bounty—"were approached by [the tenant] saying "'I am carrying on this business without any indication "'outside so that it does not upset the appearance of your "'estate, I have these old ladies who would otherwise be "'driven to an infirmary, and I have been carrying on for "'six years': would your governors say 'No'? (A.) I cannot "answer that." This was some six months after they had received the notice. On the evidence, therefore, it was not clear whether Queen Anne's Bounty were or were not prepared to allow this very limited breach of the covenant. It is to my mind plain that if a covenant like this, not having been enforced or sought to be enforced by legal process after knowledge of the breach, is to be relied on as defeating a claim for compensation, the tribunal must be satisfied beyond all reasonable doubt that it is the intention of those entitled to enforce it to take all steps open to them to do so. At this stage, therefore, in my opinion, the landlords had failed to discharge that burden.

Before the county court judge the head lessors, Queen Anne's Bounty, appeared, as I have said, by counsel. It appears from the judgment that they sought to call evidence to show that the grant of a new lease allowing the business to continue would not be consistent with good estate management. The judge refused to allow this to be done as Queen Anne's Bounty had neglected to appear before the referee. They have not appealed either from the judge's refusal to allow this evidence or from his order granting a new lease overriding the covenant. This issue, therefore, remains on the evidence as it was before the referee, and on that evidence, for the reasons already given, the point, in my opinion, fails. I am not in any way criticizing the line taken by Queen Anne's Bounty: they appear to have been content to leave the matter in the hands of the court and have accepted the decision. They may well feel that in present circumstances it would be undesirable to insist on the letter of their bond against this minor and inconspicuous breach.

It is therefore unnecessary to decide the question whether, in considering the application of the words "could be let," the existence of an enforceable covenant preventing further user for the trade or business in question is wholly immaterial. I should myself hesitate to come to the conclusion that a landlord, apart from any question of estoppel, should have to pay compensation in respect of an increased rental value which he was going to be prevented from realizing. The compensation, as was stated in *Whiteman Smith Motor Co., Ld.* v. *Chaplin* (1), is limited to the addition to the value of the premises in the hands of the landlord at the end of the tenancy. In the case put the addition would appear to be nil.

The next question is whether the judge was right in ordering a new lease. On this point, I think, the appeal succeeds on the ground that the landlords required the premises for occupation by themselves. The referee in his report construed "requires" as meaning "needs," and came to the conclusion that the landlords did not need this large house. It is unnecessary to refer to the evidence in detail, but neither in the referee's findings nor, as far as I can see, in cross-examination was any doubt thrown on the intention of the landlords to go and live in the house if they got the chance. The judge did not regard "requires" as meaning "reasonably "requires" or "needs," but as a somewhat stronger word than "intends." He, again, as I read the judgment, threw no doubt on the landlords' intention. He regarded their desire to live in this large house, and in particular Taylor's desire for the large lounge for use as a studio, as a whim or fancy.

In *Clift* v. *Taylor* (2) it is said that any real ambiguity of language ought to be resolved in favour of maintaining common-law rights. I doubt if there is any real ambiguity. "Requires" may, of course, have different senses in different contexts. In its present context it is, I think, satisfied if a landlord establishes, as the landlords here did, that he wants and intends to occupy the premises. Apart from the Act, that is his common-law right. If the legislature had intended to place some burden on him of establishing that he was reasonable or not unreasonable in requiring what was his own, plain words would have been used. Of course, if a court came to the conclusion that the evidence of intention was false, and that the landlord did not genuinely intend to occupy the premises, the claim would fail. There is, however, no trace of any finding to this effect. On this view it is unnecessary to consider the question of "reasonableness." In the result, in my opinion, the appeal must be allowed as to the new lease.

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(1) [1934] 2 K. B. 35.

(2) [1948] 2 K. B. 394.

There then arises the question of compensation. Where a new lease has been applied for, the court entertaining that application can, under s. 5, sub-s. 2, only grant compensation if it is precluded from granting a new lease on any of the grounds mentioned in s. 5, sub-s. 3 (*b*). I referred to the difficulties that may arise from this provision in *Butlins, Ld.* v. *Fytche* (1). They do not arise in the present case, as, on the view which I take, the application for a new lease fails under s. 5, sub-s. 3 (*b*) (i.). The referee fixed the figure for compensation, if awardable, at 371*l.* 9*s.* 4*d.*, and this figure was not challenged before us.

COHEN L.J. My brother Tucker has read all the provisions of the Act of 1927 to which I desire to refer, with the exception of s. 17, sub-s. 1, which defines the holdings to which Part I of the Act refers. That sub-section reads as follows: "The "holdings to which this Part of this Act applies are any "premises held under a lease, other than a mining lease, made "whether before or after the commencement of this Act, and "used wholly or partly for carrying on thereat any trade or "business, and not being agricultural holdings within the "meaning of the Agricultural Holdings Act, 1923."

The first ground of the landlords' appeal is the contention that the court had no jurisdiction to award compensation or grant a new lease because the tenant had not been tenant of the premises under one lease for a period of five years. I agree with my brethren that this point is not open to the landlords in this court.

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(1) [1948] 1 All E. R. 737.

The next question is whether the tenant can establish the existence of adherent goodwill in the premises arising by reason of the business carried on by her thereon and thus entitling her to compensation under s. 4, sub-s. 1. This is a mixed question of fact and law. The county court judge answered it in favour of the tenant, and the landlords cannot displace that finding unless they can show either that the judge has gone wrong in principle or that there was no evidence to support the conclusion which he reached.

Mr. Havers, for the landlords, contends that the judge went wrong in principle in that, in considering whether the premises could be let at a higher rent than they would have realized had no adherent goodwill attached to them, he ignored the fact that in the head lease there was a provision restricting user to user as a private dwelling-house. Mr. Avgherinos for the tenant, however, said that this was irrelevant and that the only question was whether the premises, that is, the physical premises, could be let at a higher rent, and that to that question the provision in the head lease was irrelevant.

In my opinion Mr. Avgherinos' argument is well founded: what has to be considered is, not whether the landlord could let the premises, but whether the premises could be let. The definition of "holdings" in s. 17, sub-s. 1, of the Act, which I have already read, seems to me to support the view that the expression "premises" in s. 4 means the premises in their physical condition, and that there is no reason for importing any restrictive provision in the head lease into the consideration of the question whether the premises "could be let at a "higher rent."

It was suggested that this conclusion involved a hardship on the mesne landlord. I am unable to agree: the case must be rare in which a trade could be carried on for five years on premises without the mesne landlord's being aware of that fact; and in any event, if it is open to the landlords, mesne and head landlords together, to appropriate the value of the goodwill, I see no reason why the tenant should be deprived of that value because, as between the head landlord and the mesne landlord, the head landlord may be in a position to prevent the mesne landlord's enjoying that for which he has paid.

I turn now to the question whether there was evidence on which the county court judge could properly find that adherent goodwill had attached to the premises. The expert evidence of Mr. Warner, who was called for the tenant, was, as I read it, clearly to the effect that this question must be answered in the affirmative. The county court judge so read his evidence, but, as the expert evidence must necessarily be based on the facts proved by the other witnesses, he was not prepared to act on the expert evidence without careful scrutiny of the other evidence. In this case the only other relevant evidence was that of the tenant herself. The judge discusses her evidence on this point in the passage in his judgment beginning "On "this point I was very much impressed," which has already been read by my brother Somervell. The judge concludes his observations on this point by saying: "I have therefore "not without difficulty come to the conclusion that the "referee's decision that there is an adherent goodwill is the "correct one in this case." It is not for us to say whether we should have arrived at the same conclusion; it is enough to say that it seems to me quite impossible to say that there was no evidence on which this conclusion could be reached.

The tenant had, therefore, laid the foundation for an application under s. 5 for the grant of a new lease, provided that she could prove that the compensation which could be awarded to her would not compensate her for the loss of goodwill which she would suffer if she removed to, or carried on her trade or business in, other premises. It was not disputed that the tenant was in a position to prove this fact, but it was argued first that the court had not power to grant a new lease, since the head landlord could enforce the restrictive provision in the head lease and thus render the new lease nugatory. The judge, however, held that any lease granted by him would bind the head landlord and would be an answer to any action for forfeiture which the head landlord might bring. From this finding the head landlord has not appealed, and I do not think it lies in the mouth of the mesne landlords to raise this objection. The landlords secondly contended that it was not reasonable, in view of the existence of this restrictive covenant, to grant a lease. I think that this is really the same objection in another form, and in any event I do not think that the landlords, having let the premises to the tenant for the specific purpose of carrying on on the premises a private nursing home and/or guest house, can now be heard to say that it is not

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reasonable for the court to grant a new lease for the same purposes.

A more formidable objection for the grant of a new lease is based on the provision in s. 5, sub-s. 3, which lays down that it shall not be deemed to be reasonable to grant a new lease if the premises are required by the landlord for his own occupation. The landlords in their answer contended that they would require the premises for occupation for themselves and for their son and daughter-in-law. Before turning to the evidence on this point, it is necessary to decide what is meant by the word "required." The referee came to the conclusion that this word meant "needed," and that as (1.) the landlords' allegation, so far as the son and daughter-in-law was concerned, was unsupported by evidence, and (2.), so far as the landlords themselves were concerned, they had another house which they could retain under the Rent Restriction Acts, it could not be said that they needed the premises for their own occupation.

Before the county court judge Mr. Hawser, for the landlords, contended that the referee had wrongly construed the word "required," and he relied on the judgment of Hallett J. in *Nuthall (G. C. & E.)* (1917), *Ld.* v. *Entertainments & General Investment Corporation, Ld.* (1), where that judge said: "I think that what the landlord has to prove under" s. 5, sub-s. 3 (*b*) (i.) "is that he intends to use the premises for "occupation by him just as under (iii.) he has to prove that he "intends to use the premises to carry out a scheme for re-"development." I agree with this construction of the sub-section. The county court judge purported to accept it, but qualified his acceptance in the following words: "I do not "think I am doing any injustice to that dictum if I say that "there is always a danger in interpreting a word in a statute "by the simple substitution of another, and I feel that, although "it is wrong to say that 'requires' is the same as 'reasonably "'requires' or 'needs,' yet it is a somewhat stronger word "than 'intends' and does not include a mere whim or fancy."

If by these observations the county court judge merely meant that the intention must be a genuine intention, I should not quarrel with him, but if he meant that, although the intention was genuine, the court must consider whether it was reasonable, then I am unable to agree. From the way in which the county court judge discussed the evidence, I have

(1) [1947] 2 All E. R. 384, 392.

come to the conclusion that the second interpretation of his language is correct, and that he thought it open to him to consider the reasonableness of the landlords' intention. After referring to the referee's summary of the evidence of the landlords, he says that he had had the advantage of reading a shorthand note of Mrs. Taylor's evidence, and was not at all satisfied that she genuinely required the house for her own occupation. He refers to Taylor's evidence in the following language: "Taylor, whose evidence was more frank, "is apparently wishful of having the big lounge in the house for "resuming at the age of seventy his profession as a portrait "painter; but, having regard to all the circumstances, I cannot "regard that as more than a whim, when it involves the require-"ment of an unsuitably large house for the sake of the size "and lighting of one room in it." As I read that observation, he is saying that Taylor's evidence is genuine, but that he, the judge, does not regard it as reasonable, having regard to the rest of his evidence, that at the age of seventy Taylor should want the big lounge in the premises for his professional work.

I think that it was not for the county court judge to decide on the reasonableness of the landlords' intention. In my opinion, provided that their intention was genuine, the landlords were entitled to rely on the proviso to s. 5, sub-s. 3. The judge did not himself see the witnesses, but the referee did and seems to have felt no doubt as to the genuineness of Taylor's evidence. He concludes his observations on this part of the case by saying that " he quite realized that the landlords would "like to oblige their landlord (that is the landlord of the "house they were then living in) and that that landlord "desired if they left to sell the premises." In other words, the landlords' intention was genuine, and it was inspired in part by their desire to oblige their present landlord.

For these reasons I would allow the appeal on the ground that the landlords have established that the premises are required for occupation by themselves. It is to be observed that, if the tribunal is precluded, on the ground which I have indicated, from making an order for a new lease, it is empowered by s. 5, sub-s. 2, to award such compensation as is provided by s. 4. The referee assessed the compensation that would be payable under that section at 371*l*. 9*s*. 4*d*., and that figure was adopted by the county court judge, who stated that it had not been disputed by any party to the application. Accordingly, in

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allowing this appeal, I would direct the payment of 371*l.* 9*s.* 4*d.* compensation under s. 4.

Appeal allowed.
Order of county court judge varied by substituting for the order for a new lease an order for payment of 371*l.* 9*s.* 4*d., being compensation assessed by referee. Compensation to be paid on quitting the holding.*

Solicitors for the landlords : *Dixon, Ward, Umney & Burdon.*
Solicitors for the tenant : *N. A. Woodiwiss & Co.*

R. C. C.

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Bucknill, Singleton and Denning L.JJ.

BISHOPSGATE MOTOR FINANCE CORPORATION, LIMITED *v.* TRANSPORT BRAKES, LIMITED—WINSOR GARAGE, THIRD PARTY.

Sale of goods—Market overt—" Sold in market overt, according to usage " of the market"—Maidstone market—Grant of, not superseded by statute—Market overt can rest on market constituted only by statute —Sale of car by possessor, not a trader in the market, after an auction in the market, by private treaty—Sale of Goods Act, 1893 (56 *&* 57 *Vict., c.* 71), *s.* 22, *sub-s.* 1.

The Act for erecting new market places within the town of Maidstone in the county of Kent and for the better regulating and maintaining the said markets (5 Geo. 4, c. cix) did not extinguish the grant of a market by charter made to the Mayor and Citizens of Maidstone in 1747.

" Market overt " is capable of resting upon a market constituted only by statute ; it is not confined to markets established by grant or prescription.

Ganly v. *Ledwidge* (1876) I. R. 10 C. L. 33 followed.

Evidence was given that motor-cars were regularly sold in Maidstone market by auctioneers and that, on occasion, if the reserve price of a car were not reached at auction, the vendor of that car would sell it in the market by private treaty. B., not a trader in the market, so sold a motor car in the market by private treaty. The toll had been paid by the auctioneers and recovered by them from B.

Held that the car was sold in market overt, according to the usage of the market, within the meaning of s. 22, sub-s. 1, of the Sale of Goods Act, 1893.

Per Denning L.J. If the true owner of a chattel sold in market overt seeks to set aside the sale on the ground that the sale was not in accordance with the usage of the market, the burden of proving that fact lies on him. See *Comyns* v. *Boyer* (1596) 2 Cro. Eliz. 485.

The title of the buyer in market overt cannot depend on whether the seller has done his duty by paying the market toll.

Appeal from Humphreys J.

On October 7, 1946, the plaintiffs, the owners of a Hillman motor-car, No. EVW 124, handed over its possession under a hire-purchase agreement to Mark Bronstein who paid 115*l.* down and agreed to pay the balance of the purchase price by eighteen monthly instalments of 13*l.* 18*s.* 10*d.* each, the first payment to be on November 7, 1946. Bronstein was given possession of the logbook in which his own name and address were entered. The car was to remain the property of the plaintiffs until the total amount had been paid to them.

On October 29, 1946, a Tuesday, Bronstein took the car to Maidstone market where he arrived at 10.30 a.m. and handed it to auctioneers there to be put up for auction, at the reserve price of 350*l.* The toll of 1*s.* was paid by the auctioneers to the collector for Maidstone Corporation and this toll was collected by them from Bronstein. No bid reached the reserve price and later in the day the auctioneers, at the request of Bronstein, again put the car up for auction, at the reduced reserve price of 325*l.* No bid reached that price. Later one Bourgein, who carries on business at and in the style of the Winsor Garage, West Malling, approached Bronstein, who sold the car to him by private treaty for 295*l.* The car had remained at the car park in the market throughout the day. Subsequently Bourgein having reconditioned the car, sold it to the defendants for 360*l.* Bronstein paid his instalments to the plaintiffs for a few months and then defaulted and disappeared.

The plaintiffs, having discovered that the car which they had hired to Bronstein was in the possession of the defendants, sued them for its return or damages laid at 340*l.*, subsequently reduced to 183*l.* 15*s.* 4*d.* The defendants added the Winsor Garage as a third party. The defence raised was that the car had been sold in market overt according to the custom of the market and that by virtue of s. 22, sub-s. 1, of the Sale of Goods Act, 1893, the defendants had a good title to the car. It was not disputed that Bourgein bought the car in good faith and without notice of any defect or want of title on the part of the seller, Bronstein. Humphreys J. held that the car had been

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sold in market overt, according to the usage of the Maidstone market, and he gave judgment for the defendants. The plaintiffs appealed.

There had been a market at Maidstone certainly since the time of Queen Elizabeth and probably earlier. From time to time the charter was extinguished, because, it was said, of the conduct of the citizens of that town. In 1747 a charter for the market was granted to the mayor and citizens of Maidstone to hold a market on the Thursday of every week. In 1824 there was passed " an Act " (5 Geo. 4, c. cix) " for erecting new " market places within the town of Maidstone in the county of " Kent and for the better regulating and maintaining the said " markets." By s. 52 of that Act : " Nothing in this Act " contained shall extend or be construed to extend to take " away, lessen, diminish in effect the right of the Mayor, " Jurats and Commonalty of the said town and parish to hold " any fairs . . . . " In 1933 was passed an Act (23 & 24 Geo. 5, c. lx) confirming " certain provisional orders of the Minister " of Health relating to the boroughs of Maidstone and Stockton-" on-Tees." By s. 3 of the provisional order relating to Maidstone " notwithstanding anything in the Local Act, the " council may hold a corn market on Thursday in every week " and a cattle and general market (for all goods and mer-" chandise other than goods and merchandise which are brought " to the corn market) on Tuesday in every week." The deputy town clerk of Maidstone gave evidence that the charter of 1747 of which he produced a copy was still in force and so far as the market was concerned was amended by the private Acts of 1824 and 1933. Mr. Forknall one of the auctioneers who put the car up for auction gave evidence that persons who put up cars for auction in the market could and did sometimes sell afterwards by private treaty.

I. H. Jacob for the plaintiffs. There are two issues. Did market overt extend to the sale by Bronstein of this car in Maidstone market ? And was the sale according to the usage of the market ? See s. 22, sub-s. 1 of the Sale of Goods Act, 1893 (1).

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(1) By s. 22, sub-s. 1, of the Sale of Goods Act, 1893 : " Where " goods are sold in market overt " according to the usage of the " market, the buyer acquires a " good title to the goods, provided " he buys them in good faith and " without notice of any defect or " want of title on the part of the " seller."

The grant of a market by charter to the mayor and citizens of Maidstone in 1747 was extinguished by the terms of the Act of 1824 (5 Geo. 4, c. cix). In *The Mayor, Aldermen and Citizens of the City of Manchester* v. *Lyons* (1) it was held that the Manchester Markets Act, 1846, had extinguished an ancient franchise to hold a Saturday market, among the manorial rights of the manor of Manchester, one of the six townships included in the borough, which had been purchased by the corporation.

A sale to be protected as being made in market overt must be made in a market established by grant or prescription. The market in Maidstone was established only by statute and the general market held on Tuesdays when this sale was held only by the Act of 1933 (23 & 24 Geo. 5, c. lx). From 1824 there had been no market at Maidstone established by grant or prescription. In *Moyce* v. *Newington* (2) it was admitted before the court that the market having been recently established by the Corporation of Maidstone under a local Act was not one in respect of which the protection arising from a sale in market overt could attach. That must mean on the ground that it was established by statute. Cockburn C.J. seems to have accepted that proposition without challenge. In Ireland, however, in *Ganly* v. *Ledwidge* (3) it was held that market overt extends to markets established only under statutory powers; but the point does not appear to have been argued before the court. The decision of the majority in *Ganly* v. *Ledwidge* (3) was approved of in *Delaney* v. *Wallis*, Dowse B. saying that (4), " the sale there was in market overt," but the approval expressed was on the other issue raised in *Ganly* v. *Ledwidge* (3).

On the assumption that a title by sale in market overt can be obtained on a sale in the general market held on Tuesdays, the sale of this motor car was not according to the usage of the market. The toll must be paid by the seller. Here the toll was paid by the auctioneers for the putting up of the car to auction by them and this sum was recovered from Bronstein, the apparent owner of the car. But there was no toll paid for the sale of the car by private treaty. A sale is not according to the usage of the market, if no toll is paid by the seller.

[DENNING L.J. Comyn's Digest under the title " Markets " is against you on that contention stating that market overt exists " though no toll paid " and he refers to Coke—2 Inst.

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(1) (1882) 22 Ch. D. 287.
(2) (1878) 4 Q. B. D. 32.
(3) (1876) I. R. 10 C. L. 33.
(4) (1883) 14 L. R. Ir. 31, 36.

at p. 714. See p. 713 (10.) " By the common law the property " was altered (though some opinions be to the contrary) by " sale in market overt, albeit no toll was paid either in respect " of the freedome of the faire or market wherein no toll at all " was to be paid, or for that many were discharged of payment " of toll, as the King, and some of his subjects by charter, and " some by tenure, as ancient desmesne &c, where toll of others " was to be taken."]

A toll may not be required by the usage of the market, but where it is, it must be paid or the sale is not according to the usage of the market.

[DENNING L.J. In *Comyns* v. *Boyer* (1) the fourth demurrer was: " It is not alleged here that any toll was paid, for " otherwise the property is not changed." It was held that in pleading a sale in market overt it is not necessary to allege that any toll was paid.]

Again, for the sale to be according to the usage of the market the sale must be by a trader in that kind of commodity—the the commodity sold—in the market. See *The Case of Market Overt* (2) and *Hargreave* v. *Spink* (3). Every shop in the City of London is a market overt for such chattels only which by the trade of the owner are put there for sale. And this provision extends to all markets in England where there is market overt. See also *Clayton* v. *Le Roy* (4) where Scrutton J. said (5): " A custom which takes away one man's property and gives " it to another must, in my view, be carefully watched, " especially when it is not a universal custom, but limited to " certain favoured localities." There is no usage by which the possessor of a motor-car, a stranger to the locality, can just arrive in Maidstone Market and offer his car for sale and sell it. And this apparently Humphreys J. found was the case. As Blackburn J. said in *Crane* v. *London Dock Co.* (6) to secure market overt " the buyer must buy the goods under the " circumstances such as would induce him to think the sale " a good sale in market overt—namely, he must buy the thing " which is openly exposed in market overt under such circum- " stances that he might say to himself no person but the " owner would dare to expose them for sale here and, therefore, " I have a right to assume that the shopkeeper has a right to " sell them." For market overt to extend to a market it

(1) (1596) 2 Cro. Eliz. 485.
(2) (1596) 5 Co. Rep. 83b.
(3) [1892] 1 Q. B. 25.
(4) [1911] 2 K. B. 1031.
(5) Ibid. 1044.
(6) (1864) 5 B. & S. 320.

must be "open, public and legally constituted" as Jervis C.J. said in *Lee* v. *Bayes* (1). The fact that the owners of cars which were put up for auction in Maidstone market and were not sold, sometimes sold their cars subsequently in person by private treaty cannot amount to a usage. Usage may be broadly defined as a particular course of dealing or of conduct generally adopted by persons engaged in a particular department of business life. See Halsbury's Laws of England (2nd ed.), vol. 10 at p. 35. The general characteristics of usage are dealt with at p. 39 and its proof at p. 60. See also s. 55 of the Sale of Goods Act, 1893. This motor-car was not sold in market overt, nor was it sold according to the usage of the market. (*Joblin* v. *Watkins and Roseveare* (*Motors*), *Ld.* (2) was mentioned.)

N. J. Skelhorn for the defendants and *Peter E. Lewis* for the third party were not called upon.

Bucknill L.J. All the members of the court will agree, that Mr. Jacob has been of great assistance to them and we are indebted to him for his industrious research into the authorities, and for the very lucid way in which he presented his case.

The action was brought by the plaintiffs for the return of a motor-car or for 340*l.*—its value—but in the Notice of Appeal the sum only of 183*l.* 15*s.* 4*d.* is claimed, since some further payments had been made by the hirer in respect of the contract of hire-purchase. The defence raised was that the car was sold in market overt and that the defendants are entitled to take advantage of s. 22, sub-s. 1, of the Sale of Goods Act, 1893. In this case, there is no question but that the buyer bought the motor-car in good faith; and, without notice of any defect or want of title on the part of the seller. Bronstein was given possession of the registration book by the plaintiffs in which his own name and address were entered and this would be seen by Bourgein, who bought the car. Mr. Jacob has referred us to a case recently decided as to what is the effect of a registration book—*Joblin* v. *Watkins & Roseveare* (*Motors*), *Ld.* (2)—Croom-Johnson J. in that case held that the book was not a document of title as defined by s. 1, sub-s. 4, of the Factors Act, 1889, but it will be noticed that by that reg. 9 (1.) of the Road Vehicles (Registration and Licensing) Regulations, 1941: "On the sale or other change of ownership of a "vehicle the then owner of the vehicle shall deliver the

(1) (1856) 18 C. B. 599, 601.

(2) (1948) 64 T. L. R. 464.

"registration book to the transferee or other new owner and "forthwith notify in writing the change of ownership to the "council whose name appears in the registration book." Croom-Johnson J. in the course of his judgment in *Joblin's* case, said: "Though one reason for the book is to make "known who is the owner of the vehicle to which it refers, "its primary purpose is to show who is the person liable to pay "the road fund licence in respect of the vehicle. I do not "think it is anything more than that."

[His Lordship stated the facts in the case and continued:] The question here is whether this was a sale in market overt. Speaking generally, the position of the market at Maidstone is this: there has been a market there certainly since the reign of Queen Elizabeth and probably before; from time to time the charter seems to have been extinguished because of the conduct of the citizens of Maidstone, but eventually, in 1747, a charter was drawn up and bestowed upon the mayor and citizens of that city. I do not propose to read it, but it is a charter to hold a market on Thursday of every week; it is not specified what kind of articles of merchandise are to be sold there, but it says that the "mayor, "jurats and commonalty" of the town may "take reasonable "piccage money for the showing of goods and merchandizes "there to be sold or exposed for sale." In 1824, a private Act (5 Geo. 4, c. cix) was passed which in some respects extended the powers of sale by moving the market to a more commodious place and gave powers to set up various stalls, slaughterhouses, and so on.

The first point made by Mr. Jacob was that the Act of 1824 extinguished the charter of 1747. The second point in connexion with that argument was that a market overt can only rest upon a grant and cannot rest upon a statute. In my view, Mr. Jacob failed to establish either of those points. As regards the question whether the statute of 1824 extinguished the charter of 1747, the evidence on that point—so far as it is a question of fact—is all one way because of the evidence given by Mr. Moys, the deputy town clerk for Maidstone Borough Council, when he said this: "The original charter was "granted in 1549, and I believe there were two further charters, "but the first three were withdrawn owing to some mis-"behaviour in the town at that time, and the 1747 charter, "of which I have produced a copy, is the one at present in force, "and, as far as the market is concerned, has been amended "by the Act of 1824 and the Act of 1933." That is a very definite statement by the deputy town clerk that the charter was in force, and, when Humphreys J. came to give his judgment—there being no other evidence about it—he said: "A local Act passed in 1824 made certain alterations not "material for the purpose of this judgment . . . ." Referring to alterations to the charter, the court has been somewhat hampered in pursuing its investigations as to what precisely was contained in the private Act of 1824 as it has only had the advantage of one copy of the Act to share between three judges, but, so far as I can see by reading it through, there is nothing in that Act to show that there was any intention on the part of the legislature to extinguish the charter and to substitute the statute for it. On that point, I would refer to *The Mayor, Aldermen, and Citizens of the City of Manchester* v. *Lyons* (1), and especially to the judgment of Cotton L.J., when considering the question of the effect of a statute upon an earlier market granted by grant. Cotton L.J. said in that case (2): "In every such case it is a question to be determined "by a consideration of the whole of the Act whether the rights "given by the Act are intended to supersede the rights which "previously existed." As far as I can see, there is no intention here to that effect. But, even if that point had been established by Mr. Jacob, I think he failed to establish his second limb of the argument, namely, that a market overt must rest upon a grant and cannot rest upon a statute. His authority for that proposition was, first of all, the case of *Moyce* v. *Newington* (3). In that case the question of the conversion of certain sheep which had been sold at the Maidstone Market was considered and Cockburn C.J. in the course of his judgment said (4): "It is to be observed that, though "the sale from Wale to the plaintiff took place in open market, "it was admitted before us that the market, having been "recently established by the corporation of Maidstone under "a local Act, was not one in respect of which the protection "arising from a sale in market overt would attach." Mr. Jacob argued that this was a blessing—rather a lukewarm blessing—bestowed by Cockburn C.J. on his point that a market established by an Act is not a market overt, but, having regard to the complexity of the subject and the fact that there was no argument on the point, I think that the Chief Justice on

(1) 22 Ch. D. 287.

(2) Ibid. 307.

(3) 4 Q. B. D. 32.

(4) Ibid. 34.

that admission did not intend to decide the point. As against that, there are two cases in Ireland—*Ganly* v. *Ledwidge* (1) and another in the Court of Appeal *Delaney* v. *Wallis* (2)—which quite clearly lay down that markets established under statutory powers are markets overt. In that connexion I need only refer to Benjamin on Sale (7th ed.) at p. 19: "As to modern markets established under statutory powers, "in the case of the Dublin cattle market, the Queen's Bench "Division in Ireland had 'no hesitation in holding that this "'great public market, established by the Corporation under "'Parliamentary powers, is a market overt.' And such a "market would certainly seem to fall within the definition of a "market overt given by Jervis C.J. above cited" (*Lee* v. *Bayes* (3) "as 'an open, public, and legally constituted "'market'." It is interesting to see that that view has been adopted in Victoria, Australia, see *Ward* v. *Stephens* (4). In my view, the second limb of that argument also fails.

The next point which Mr. Jacob argued was that in a market where a toll is payable the sale is only protected if the toll is paid by the person who effects the sale. There is no evidence in this case other than that which was given at the trial, namely, that the toll of a shilling was paid by the auctioneers who put the motor car up for auction; they collected the shilling from the vendor and that seems to me to be in accord with the charter of 1747, which entitles the authorities at Maidstone to charge a toll for the showing of the article for the purposes of sale. It seems to me a sensible and reasonable method of dealing with the matter that the man who brings the article into the market for the purpose of selling it, or trying to sell it, has to pay a shilling; either himself if he sells it personally; (if he does not sell it at all, still he has to pay the toll), or, if an attempt is made to sell it by auction, he also has to pay the toll.

The next point which Mr. Jacob made was this: In order to get the protection of a sale in market overt, the goods must be put up for sale by a trader in the market. There is no authority for that proposition. The *Case of Market Overt* (5) to which Mr. Jacob referred, was based on entirely different facts. In that case some plate, which had been stolen, was sold in a scrivener's shop in London on market day, and

(1) I. R. 10 C. L. 33.
(2) 14 L. R. Ir. 31.
(3) 18 C. B. 599, 601.
(4) 12 Vict. L. R., 378.
(5) 5 Co. Rep. 83b.

the court held that that was not a sale in market overt. The court consisted of the Chief Justice of England, the Chief Justice of the Common Pleas, the Master of the Rolls and the Attorney-General. The court held: "That "if plate be stolen and sold openly in a scrivener's shop "on the market day . . . . this sale should not change "the property, but the party should have restitution; for a "scrivener's shop is not a market overt for plate; for none "would search there for such a thing." "But if the sale had "been openly in a goldsmith's shop in London, so that any "one that stood or passed by the shop might see it, there it "would change the property." The judgment ends with the words: "So every shop in London is a market overt for such "things only which by the trade of the owner are put there to "sale; and when I was Recorder of London" (that is a reference to Coke himself, who was apparently Recorder of London at the time when this case was decided) "I certified "the custom of London accordingly." If one considers the reason for protecting people who buy with the honest belief that the vendor has a good title to sell, provided the necessary safeguards are taken of selling in the market in the day time and exposing the article for sale, there does not seem to me to be any reason in principle why a sale should not be equally good if made by the possessor himself, as it admittedly would be in this case if the motor-car had been sold by auction.

I come now to the last point taken by Mr. Jacob—I think it is the best point: that this sale by private treaty was not a sale according to the usage of the market. Humphreys J. dealt with the point and stated in his judgment that there was no custom or usage to his knowledge for dealers or owners of motor cars to sell, or offer cars for sale, at the market except for sale by auction through the firm of Forknall & Sons, Auctioneers. There is a reference to Mr. Forknall's evidence, and the learned judge in dealing with that said this: " . . . . he "had nothing to do with such transactions. There was no "practice in the market of motor-car dealers or owners selling "direct to members of the public." Humphreys J. then continued: "There is, therefore, no doubt that the sale in "question took place in a public market. It can, I think, "hardly be disputed that the sale and purchase of the car in "question, if it had been effected by auction, would have been a "sale in market overt, according to the usage of the market.

C. A.
1948

BISHOPSGATE MOTOR FINANCE CORPORATION, LD.
v.
TRANSPORT BRAKES, LD.
WINSOR GARAGE, THIRD PARTY.

Bucknill L.J.

" There would, in that event, have been present all the element
" of publicity and open dealing by persons of repute to whom
" recourse could be had if required. Mr. Gallop's point, was
" that the sale between two private persons was not such a sale.
" On this aspect of the matter reference may be made to the
" judgment of Blackburn J. in *Crane* v. *London Dock Co.*
" Blackburn J. said (1) : ' Then comes the question which it is
" ' necessary to decide, namely whether this was a sale in market
" ' overt. It is pretty clear that the privilege given by law to a
" ' sale in market overt, of binding property against the true
" ' owner, was originally given in consequence of its policy of
" ' encouraging markets and commerce—I agree with the
" ' plaintiff's counsel so far. But I think that, for that purpose,
" ' the buyer must buy the goods under circumstances such as
" ' would induce him to think the sale a good sale in market
" ' overt ; —namely, he must buy a thing which is openly
" ' exposed in market overt under such circumstances that he
" ' might say to himself no person but the owner would dare to
" ' expose them for sale here, and, therefore, I have a right to
" ' assume that the shop-keeper has a right to sell them.
" ' I think this principle runs through all the cases, that the
" ' goods must be corporally present and exposed in the
" ' market '." Having applied his mind to that judgment and
to the facts of the case, and bearing in mind that although there
may be no custom to sell motor cars in the market except by
auction—there was evidence it was frequently done—
Humphreys J. dealt with the matter in this way : " On the
" whole, I think the defendants have established that the
" purchase of the car was in market overt. He bought in a
" long-established market where, to his knowledge, motor-cars
" had been publicly sold for years. He bought a car which had
" been so publicly offered for sale, he paid a fair price for the car
" and there was nothing in the transaction calculated to arouse
" suspicion. In my view, the mere fact that this purchase
" was not made through an auctioneer did not operate to
" remove the sale from the category of sales in market overt
" so as to prevent him from acquiring a good title to the car."
I agree with the conclusion of the learned judge and I do not
think that I can put it in better or in as good language.
If there had been clear proof in this case that a car had
never been sold in the market except by public auction
and there was a usage to that effect and no other usage

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(1) 5 B. & S. 319.

and that that was a most unusual transaction, there might be something to be said for the point that it did not come within s. 22, sub-s. 1, of the Sale of Goods Act, 1893. That is not the evidence in this case. It is largely a question of fact that cars were undoubtedly sold by private sale as well as by public auction. All the principles which support a sale in market overt are present in this case. For those reasons, I think that the sale took place in market overt and that the appeal should be dismissed.

Singleton L.J. I should like to add my tribute to the industry shown by Mr. Jacob in the preparation of the plaintiffs' case for presentation to this court. He referred us to a large number of authorities when we were dealing with the question of market overt and a most interesting argument followed. It seems to me that only a few of those authorities really need to be examined in order to come to a conclusion as to the true position in this case. The material part of the defence is in para. 4 and it is in these terms: " The said car was bought by " the Winsor Garage "—that is, Bourgein—" on a day in " October, 1946, in market overt according to the usage of the " market at Maidstone in the county of Kent, in good faith and " without notice of any defect or want of title on the part of the " seller of the said car." That, of course, brings into play s. 22, sub-s. 1 of the Sale of Goods Act, 1893.

It appears to me that there are two things to be ascertained: first, was this a sale in market overt? Secondly, was it according to the usage of the market? If so, the buyer can claim a good title and the plaintiffs' claim in this action fails. In order to find the answer to those two questions, the facts must be examined. Again, it seems to me that very largely it is a question of fact in each case. As to the first point, was this a sale in market overt? There has been established in Maidstone for many centuries a market or markets. As my Lord pointed out, the deputy town clerk gave evidence as to the position and he said that the charter of 1747—of which he produced a copy—is the one at present in force as far as the market is concerned and that it has been amended by the Act of 1824 and the Act of 1933. There had been earlier charters giving rights to the mayor and councillors to hold markets and sales at certain times. Mr. Jacob submitted that the effect of the Act of 1824 was to wipe out the charter of 1747 entirely. I cannot see that that is right, particularly having regard to the terms of

s. 52 of the Act of 1824. Furthermore, Mr. Jacob submitted that the only matter at which the court need look was the Act of 1933, which confirmed certain provisional orders. I do not think that that submission is right. For reasons given by my Lord, I think that one is entitled to look further back, but I am not sure that it matters much. Since part 3 of the provisional order relating to Maidstone confirmed by the Act of 1933 provides that: " Notwithstanding anything in the Local " Act, the council may hold a corn market on Thursday in " every week and a cattle and general market (for all goods " and merchandise other than goods and merchandise which are " brought to the corn market) on Tuesday in every week," Counsel contended that the general market was held under that power only and that this was not the case of a sale in market overt, because a market overt must be created by a charter or grant—something dating from long, long ago—and cannot be created by an Act of Parliament. As to that submission of his, it seems to me to be covered—and covered completely—by the two decisions in the Irish courts to which my Lord has referred. The first was *Ganly* v. *Ledwidge* (1), in which it was said: " The protection attendant upon a sale in market " overt is not confined to ancient markets created by charter or " prescription, but extends to modern markets established " under powers conferred by Act of Parliament." It was there stated that " The new cattle market was established by the " corporation of Dublin under the provisions of ' The Dublin " ' Improvement Act ' (12 and 13 Vict., ch. 79, ss. 79 and 80), " and on every Thursday a public market for the sale of cattle " is held in it," so anything sold in that market was a sale in market overt. That case was followed by another case in the Irish Court of Appeal *Delaney* v. *Wallis* (2). Speaking for myself, I am bound to say that I cannot see why there should be any such limit, as Mr. Jacob put, upon the creation of market overt. I do not see why it cannot be created by statute. That point fails.

What is the meaning of market overt? This has been discussed more than once. In the case of *Lee* v. *Bayes* (3), it was held that " A sale by public auction at a horse repository out " of the city of London, is not a sale in market overt." Counsel arguing that case made this submission: " The horse having " been stolen, no property in it of course could pass to the

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(1) I. R. 10 C. L. 33.
(2) 14 L. R. Ir. 31.
(3) 18 C. B. 599.

" defendant unless he had purchased it in market overt." Then said Creswell J.: " So they may open any shop; but " that does not, except by custom in London, constitute a " market overt." In the course of the argument Jervis J. gave the following definition of market overt (1): " It is an open, " public, and legally constituted market . . . ." So far as I know, no better definition has ever been given, and it was adopted by the editor of Benjamin on Sale in the passage at p. 19 which my Lord has read. Upon the evidence given in the court below, I regard this market as fulfilling in every way the requirements of market overt and it seems to me beyond doubt that the sale of the motor-car was a sale in market overt.

The next question is whether the sale was according to the usage of the market. I regard that as a more difficult question, but, again, when the evidence is examined, I think we ought to hold that the sale was according to the usage of the market. The evidence was this: that the car was taken in the morning to the public market where sales by auction are held and where, apparently, goods are sold otherwise than by auction. A toll of one shilling was paid to the collectors for the corporation and collected by the auctioneers from the vendor, Bronstein. The car was then put up for sale by auction, but, when it was so put up, it did not reach the reserve for sale by auction. The auctioneer who moved down the line had a chair on which he stood near the cars. There was a reserve of some 350*l.* put upon the car, but it did not realize that. There were a number of other cars there and the auctioneer attempted to sell them by auction, and, when that had been done, Bronstein, who was still there, asked the auctioneer to put up the motor car again and put on a reserve of some 25*l.* less. Again, the car was put up for auction, but the bidding did not come up to the reserve. The auctioneer then passed on to another car, but Bourgein, who had seen this car earlier, looked at it further and Bronstein went to him and asked him if he would like to buy it. In the result, a sale was effected at 290*l.* which was said to be a reasonable price for that car. Bourgein, having done some repairs to the car, or some reconditioning of it, later sold the car to the defendants in this action. It is not said that the defendants were otherwise than honest in every sense, and it is admitted that Bourgein who bought the car at the market acted in good faith and that he paid a reasonable price for it.

(1) 18 C. B. 599, 601.

The argument of Mr. Jacob is that the sale was not according to the usage of the market because things which were sold at this time were usually sold by auction. The auctioneer, Mr. Forknall, was asked about that and he said: "Well, "of course, you get a dealer who comes and puts a car into an "auction sale with no intention of selling it, but merely to find "out who is likely to be interested and to see how they will go, "and then have a deal afterwards." The learned judge asked: "It does not matter what the intention is—he puts "it in auction?—A. Yes, and then trades afterwards." A little later the learned judge said: "Therefore, you cannot "have dealers coming in and saying, 'Here is my car. Now, "'then, what offers for it?' Unless they are licensed, they "are not allowed to?—A. No, but they can sell, by private "treaty, after the auction." So, it appears upon the evidence that there were at this market both sales by auction and also sales by private treaty afterwards. Upon the evidence, which was not contradicted in that regard, in my view it was open to the learned judge to find not only that the car was sold in market overt, but that it was sold according to the usage of the market.

We were referred to a judgment of Scrutton J. in the case of *Clayton* v. *Le Roy* (1), and in particular to the passage in the Law Reports at p. 1044. The learned judge said: "A custom which takes away one man's property and gives it "to another must, in my view, be carefully watched, especially "when it is not a universal custom, but limited to certain "favoured localities." The learned judge was dealing with a case of a sale in a shop at that time, but, assuming as I do that his words could be taken generally, I venture respectfully to agree that every such custom must be watched carefully. I think it has been in this case. Humphreys J. found in favour of the defendants that this was indeed "a sale in market "overt according to the usage of the market," and, if it matters, I would say that my sympathies are with them rather than with the plaintiffs, a finance company, who apparently let out on hire to one Bronstein, without inquiry, a motor-car, which made it quite easy for Bronstein to go away and sell it as he did. I agree that the appeal should be dismissed and that the judgment of Humphreys J. should be upheld.

DENNING L.J. I agree. In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times. The modification here in question is one conferred by the common law itself.

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(1) [1911] 2 K. B. 1031.

It has always been held that a sale in market overt—according to the usage of the market—to one who takes in good faith and for value without notice confers a good title on the buyer. The law is fully explained by Lord Coke in 2 Inst. at pp. 220 and 713. In my opinion, this beneficent rule of the common law applies not only to open markets created by grant or prescription, but also to open markets authorized by statute. When the legislature authorizes the holding of a market, it must be taken to intend to attach to it all the privileges attaching to a market by grant or prescription. It follows that a sale in Maidstone Market according to the usage of the market is a sale in market overt and that, prima facie, sales in that market confer a good title. If the true owner seeks to set aside a sale on the ground that it was not in accordance with the usage of the market, the burden is on him to show it: see *Comyns* v. *Boyer* (1). The fact that the toll has not been paid to the corporation is not a ground for setting aside a sale. It is payable by the one who exposes the goods for sale and the title of the buyer cannot depend on the chance whether the seller has done his duty and paid the toll. The fact that the goods are not sold by an auctioneer, but by a dealer, or by the apparent owner, is also no ground for setting aside the sale, unless indeed the usage of the market only allows sales to be made by auctioneers. That, however, is not the case here. It is plain on the evidence that after an auctioneer has failed to sell, the dealer—or apparent owner—often sells himself. There is therefore no ground for saying that the market is confined to sales by auctioneers.

The protection we have granted to-day to the buyer of a motor car in market overt protects him, of course, only in so far as he buys in good faith and without notice. It seems to me that the system of registration books for motor-cars, if properly worked, should do a great deal to protect both the true owner and the innocent purchaser. The registration book of a car, or the logbook as it is called, may not itself be a document of title, but it is the best evidence of title. The transfer of the logbook does not itself transfer the property in the car. The property, as a rule, is only transferred by sale and delivery, but a transfer is open to suspicion unless the logbook is handed over. The wise buyer insists on it in order to be sure that the seller is the owner and that the car may lawfully be on the road. If the logbook is not produced or if it contains the name of a third person as the owner, or if it has been obviously tampered with, the buyer is immediately put on inquiry. If he should complete the purchase without getting the position cleared up, he does so at his own risk. So, also, a logbook may be produced which is good on the face of it, but the number on the motor-car may have been obviously altered to correspond with the logbook by the use of a number-plate which is faked. Such a fact should put the buyer on inquiry. If he makes none, he does so at his own risk. Assuming, therefore, that the true owner keeps his logbook safe in his own name and in his own hands, it is unlikely that any stranger will get a good title to the car. A thief can only dispose of the car by forging some other logbook so as to give it the same number as the car, or by altering the number-plate so as to correspond with the number of another logbook ; each of which is difficult to do in a way that is not noticeable to a careful purchaser.

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(1) 2 Cro. Eliz. 485.

The plaintiffs here did not keep the logbook in their own hands or in their own name. They were a finance company who allowed the hirer to have the car and take the logbook in his own name. By reason of that fact, he was able to dispose of the car to an innocent purchaser. It would be carrying the protection of property too far if we were to say that the plaintiffs can defeat the title of that purchaser. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs : *M. H. Shanson.*

Solicitors for the defendants : *Rider, Heaton, Meredith & Mills, for Osborne Ward & Co., Bristol.*

Solicitors for the third party : *Rider, Heaton, Meredith & Mills, for Osborne, Ward, Vassall, Abbot & Co., Bristol.*

C. G. M.

BARCOCK *v.* BRIGHTON CORPORATION.

1948
Dec. 9.

Hilbery J.

Master and servant—Accident to servant—Safe system of work—Contributory negligence.

The plaintiff was employed by the defendant corporation at a sub-station of their electricity undertaking which was a factory within the meaning of the Factories Act, 1937, and was also a place to which the Electricity (Factories Act) Special Regulations, 1908 and 1944, applied. In the sub-station there was a switchboard for extra high pressure and the regulations specified the steps to be taken for the purpose of rendering the switchboard dead when work had to be done on it. The plaintiff had been in the defendant's employment for a number of years and by 1935 had become a fitter. In that capacity he acted as assistant to the official whose duty it was to make tests in connexion with the switchboard. The official in question, instead of following the safety provisions laid down in the regulations, adopted a procedure which involved a measure of risk in order to facilitate the operation and the same procedure was followed by his successor for whom the plaintiff also worked. In 1944 the plaintiff was appointed by the defendants to be an authorized person competent to undertake work where technical skill or knowledge was required in order to avoid danger, and he was instructed to familiarize himself with the regulations. It thereupon became his duty, without supervision, to carry out the tests at which he had previously assisted and, in doing so, he continued to follow the procedure which his predecessors had adopted. While carrying out a test in that way, an explosion occurred, and the plaintiff was injured. He brought an action against the defendants alleging that they had been guilty of a breach of statutory duty and, alternatively, at common law for the alleged failure on their part to provide a safe system of work. The defendants contended (1.) that it was the duty of the plaintiff, to whom the work of making the tests had been delegated to comply with the regulations; (2.) that in providing the plaintiff with a copy of the regulations with instructions to follow them the defendants had provided a safe system of work; and (3.) that the plaintiff had been guilty of contributory negligence.

Held : that even if the plaintiff, to whom the duty of making the tests without supervision had been delegated, was himself guilty of a breach of the statutory regulations, he was, nevertheless, entitled to recover at common law. The defendants had not provided a safe system of working merely by handing the plaintiff a copy of the regulations with instructions to comply with them, and even if those acts had constituted the provision of a safe system, by a long usage that paper system had been entirely disregarded by the plaintiff's superiors and he was not guilty of contributory negligence because he did not break away from the method of doing the work in the way in which he had always seen it done.

ACTION.

The plaintiff, C. W. Barcock, was employed as a fitter by the Brighton Corporation at a sub-station of their electricity undertaking at Paston Place, Brighton, such sub-station being a factory within the meaning of the Factories Act, 1937, and also a place to which the Electricity (Factories Act) Special Regulations, 1908 and 1944, applied. There was at the material time in the sub-station a switchboard for extra high pressure and reg. 1 and reg. 18 (*d*) of the Electricity Regulations specified the steps to be taken for the purpose of rendering the switchboard dead when work had to be done in connexion with it, so that the risk of accident might be avoided. The plaintiff originally entered the defendants' employment as a labourer. He subsequently became a fitters' mate, and after serving in that capacity for three or four years, a fitter. In 1935 he was working as assistant to one Bousfield, a skilled electrician, who was the sub-station superintendent. While Bousfield was making the tests in connexion with the switchboard which the plaintiff was later required to perform, to facilitate the operation, it was his practice, instead of following the directions contained in the regulations, entirely to remove the safety device which formed a part of the apparatus. On first seeing this procedure adopted, the plaintiff asked if it were not dangerous. Bousfield agreed that it was but added that if some risk were not taken nothing would ever get done. Thereafter the plaintiff was accustomed to seeing the same method employed and, on Bousfield's retirement, his successor, to whom the plaintiff also acted as assistant, continued to carry out the work in the same way. By a departmental letter, dated October 21, 1944, the plaintiff was appointed by the defendants to be an authorized person within the meaning of the Electricity Regulations, competent to undertake work where technical knowledge or experience was required in order adequately to avoid danger, and was informed that he must make himself conversant with a memorandum by the senior electrical inspector of factories on the subject of the electricity regulations, with a copy of which he was provided. On being so appointed it became the duty of the plaintiff, without supervision, to make the same tests as had been made by the officials under whom he had previously worked, and in doing so he continued to follow the method which had been adopted by them. On November 21, 1946, while the plaintiff was carrying out work on the switchboard in accordance with his usual practice, an explosion occurred and he was seriously injured. He brought an action against the defendants on the ground of their alleged breach of statutory duty and also at common law for their alleged failure to provide a safe system of work. By their defence, the defendants pleaded that there had been no breach of statutory duty by them and that it was the plaintiff's duty, as the person to whom the making of the tests had been delegated, to comply with the regulations. They also denied that they had failed in their duty to provide a safe system of work and pleaded that any damage which the plaintiff had suffered had been caused by, or contributed to, by his own negligence.

Beney K.C. and *Marven Everett* for the plaintiff.

Granville Sharp K.C. and *Michael Maxwell* for the defendants.

HILBERY J. after stating the facts and reading the material regulations, continued: I am satisfied that if the safety appliance had been left in place it would have complied with the requirements of reg. 1 and reg. 18 (*d*). The plaintiff contended that the fact that it was out of place constituted a non-compliance with the regulations for which the defendants remained responsible. The defendants, on the other hand, said that if the safety apparatus was out of place, it was because the plaintiff had removed it by his own deliberate act. The plaintiff, they said, was the person to whom they had delegated the duty of performing this particular test and he had been expressly ordered to make himself acquainted with the regulations by the terms of his appointment as their delegate to do the work. That contention of the defendants raised the question as to what was the position when an experienced man had delegated to him a statutory duty which was incumbent on his employers, and who sustained an injury from an accident which resulted from his not having performed the duty. In considering this question, I do not find it easy to reconcile the judgment of Lord Goddard C.J. in *Smith* v. *Baveystock & Co., Ld.* (1) and the decision of the House of Lords in *Vincent* v. *Southern Ry. Co.* (2) with the decision in *Cakebread* v. *Hopping Brothers (Whetstone), Ld.* (3), but that they are reconcilable must, I am sure, be the fact. In *Smith* v.

(1) [1945] 1 All E. R. 531.

(2) [1927] A. C. 430.

(3) [1947] K. B. 641.

Baveystock & Co., Ld. (1), which was a case of an accident with a circular saw to a circular saw worker Lord Goddard C.J. said: "The plaintiff adjusted the guard at what he considered was a "suitable height to enable him to cut through this plank "which was of varying or irregular thickness without stopping "the machine. For myself I should have thought, provided, "of course, that he had not left a wholly unnecessary gap, "that he would put an adjustment on the guard which, in the "circumstances, was practicable. But in any case it seems to "me that the delegated duty had been put on him to adjust this "guard and if he did not adjust the guard in such a way as was "safe, it seems to be pretty clear—and that was the "foundation of the decision in *Vincent* v. *Southern Ry. Co.* "(2)—that he cannot complain of it. He cannot take "advantage of his own wrong and say to his employer: "'Although you left me to adjust it and I did not adjust it, "'therefore I am going to claim damages against you'." It is that judgment in those terms on which the defendants rely. It is said by them, and it seems to me with great force, that so far as any breach of the regulations in the present case is concerned, the case is just such a one as *Smith* v. *Baveystock & Co., Ld.* (1) because the plaintiff was informed by the authorization given to him, that until further notice he would be required to carry out the routine testing of switch gear without supervision and would be the person responsible for doing the work. In these circumstances it seems to me very difficult to say that so far as there was any breach of the regulations in the present case, it was not a breach committed by the plaintiff himself to whom the duty of doing the test was left expressly, without supervision, and I should find it difficult to decide in the plaintiff's favour, in the face of the facts and the decisions to which I have referred, if his case depended entirely on the breach of the statutory regulations. It does not do so because it is also based on the common law duty of the master to provide a safe system of work and in my opinion the plaintiff has established a breach of that duty. On the facts of this case I ask myself—what system for doing this particular work, namely for making these periodic tests at their seventy substations, had the plaintiff's employers devised? It was their duty to provide a reasonably safe system of work, but all that they said was "We, the masters, provided the safe system "of work because we told the man to read the regulations, and

(1) [1945] 1 All E. R. 531.

(2) [1927] A. C. 430.

"if he had read them and had construed them properly"— a thing which we lawyers have great difficulty in doing— "he would have understood that the master was offering him "a system for doing the work." I do not think that the master was doing any such thing. A system of work is not devised by telling a man to read the regulations and not to break them. In the present case, in my view, no responsible person on behalf of the defendants had devised any system for doing this particular work. But even if it could be said that they had done so, by a long usage that paper system had, in practice, been utterly disregarded. It is no use for a master to say in court "I discharged my common law duty because "I put down on paper a safe system and put it into the hands "of the man" if for years they showed him by the action of those who were his superiors that the work was not done in that way, need not be done in that way, and could be done in another way which involved danger. I should have thought that instead of providing a safe system of work, what the masters here had, in fact, provided throughout the years was an unsafe system which it was expected should be employed, notwithstanding that it involved risk, because, in the view expressed by Mr. Bousfield, under whom the plaintiff originally worked, "If you do not take risks you do not get much done." The last question to be decided is whether, so far as the plaintiff's claim at common law is concerned, it is answered by the allegation that he was guilty of contributory negligence. Of course the bare statement that he removed the safety device which was there to prevent such an accident as that which occurred, and that he did so as an experienced man in charge of the work, is a formidable proposition to answer. But in considering whether he was negligent in doing the work in the way which he adopted, it is highly appropriate to bear in mind that, if I am right in holding that the master in this case provided no system for doing this particular work, the plaintiff was left to his own devices in deciding how it should be done. He himself had received no tuition or instruction. He joined this particular undertaking as a labourer, advancing himself by his intelligence and, I suppose, his diligence, to the higher grades until at last he became what is called "an authorized "person." During all this time, apparently with no interference by the higher authorities, he had seen all the superiors under whom he worked, do the work in this particular way, although doing it in that way involved some negligible risk

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which in their view should be undertaken in the cause of getting the work done. I ask myself, was this man in the circumstances guilty of contributory negligence because he did not break away from that system and devise some other for himself? I find myself incapable of so holding. I think, as a matter of justice and common sense, and trying to place myself in the position of the plaintiff, that I should not have considered myself wanting in reasonable care because I accepted such risk as there seemed to be in doing the work in the way in which I had always seen it done. I do not think that that amounted to such contributory negligence on the plaintiff's part as debarred him from his remedy at common law or made him fractionally responsible under the Contributory Negligence Act, for the injury which he suffered. In the circumstances, therefore, I think the plaintiff is entitled to recover at common law and there will be judgment for him for 3,767*l.*

Judgment for the plaintiff.

Solicitors for the plaintiff: *Rowley, Ashworth & Co.*
Solicitors for the defendant: *William Charles Crocker.*

P. B. D.

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Nov. 30;
Dec. 1, 20.

Tucker and Asquith L.J. and Jenkins J.

JOHN LAING & SON LIMITED v. ASSESSMENT COMMITTEE FOR KINGSWOOD ASSESSMENT AREA AND OTHERS.

Rating—Amendment of valuation list—Building contractors' offices, canteens, and other structures—Actual and exclusive occupation—Rateable occupation—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-s.* 10.

Building contractors, having entered into a contract with the Air Ministry to execute works involving the lengthening and widening and strengthening of a runway, the preparation of a landing ground and the demolition of buildings, on a Government aerodrome, erected on the site, for the purpose of carrying out the contract, offices, garages, canteens for workmen and other structures. The site had been handed over to the contractors but by the conditions in the contract the execution of the work was subject to the control and directions of the Ministry's superintending officer.

On an appeal by the contractors against a proposal by the local rating authorities to amend the current valuation list by adding thereto the contractors' offices and other structures as a rateable hereditament, a special case was stated under s. 11 of Baines' Act for the opinion of the Divisional Court on the question whether the contractors were in rateable occupation of the said hereditament. The Divisional Court answered the question in the affirmative, holding that the contractors were occupying the site, as licensees, for the purpose of carrying on their business, thereby acquiring a beneficial occupation. On appeal—

Held, that the control exercised under the contract by the Ministry was with regard only to the performance of the contract and was not such as to interfere with the exclusive occupation of the hereditament by the contractors for the purposes of their business.

Decision of Divisional Court [1948] 2 K. B. 116 affirmed.

Principles laid down in *Westminster Council* v. *Southern Ry. Co. and W. H. Smith & Son, Ld.* [1936] A. C. 511 applied.

Cleveland Bridge & Engineering Co., Ld. v. *Darlington Union Assessment Committee* (1923) 21 L. G. R. 511 overruled.

APPEAL by plaintiffs from decision of Divisional Court on case stated.

By a contract in writing dated June 21, 1946, made between His Majesty's Secretary of State for Air and the plaintiffs, John Laing & Son, Ld., the plaintiffs undertook to execute works involving the strengthening, widening and lengthening of the east-west runway, the preparation of the landing grounds, and the demolition of buildings, at Filton Aerodrome in the county of Gloucester. The contract price was approximately 1,250,000*l*. On June 26, 1946, a part of the site was handed over to the plaintiffs for the assembly of plant and offices, and the remainder of the site on which constructional work had to be carried on was handed over in sections as it became available. In the execution of the contract the plaintiffs necessarily employed a very large supervisory staff, for whom temporary office accommodation had to be provided. They also had to erect garages, workmen's canteens, weighbridge and other huts, concrete bases for plant and machinery, and loading ramps and platforms. By the conditions of the contract the work was to be executed subject to the control and directions of the Ministry's superintending officer.

On February 21, 1947, the rating authority for the Thornbury Rural District Council made a proposal to amend the current valuation list by adding thereto, as a rateable hereditament, the plaintiffs' " offices, canteens, huts, structures, land, etc.,"

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which they assessed at 484*l.* gross and 400*l.* rateable value. The plaintiffs objected to the proposal and on March 21, 1947, their objection came before the defendant assessment committee who decided to make the proposed amendment. The plaintiffs thereupon gave notice of appeal to the county of Gloucester quarter sessions. On March 5, 1948, Birkett J., by consent of the parties, ordered, under s. 11, of Baines' Act, a special case to be stated. The question of law for the opinion of the Divisional Court was whether the plaintiffs were in rateable occupation of all or any of the structures comprised in the said hereditament.

On April 29, 1948, the Divisional Court (1) answered the question of law in the affirmative, holding that the plaintiffs occupied the land as licensees and for the purpose of their business, thereby getting a beneficial occupation.

The plaintiffs appealed.

Harold Williams K.C. and *R. D. Stewart-Brown* for the plaintiffs. Rateability depends on the occupation of land. The fact of occupation by somebody is normally quite clear, but cases of difficulty arise where it is found that two or more persons may be said to occupy, and it has to be determined which is in occupation for rating purposes. Such cases appear to fall into three groups (1.) where there is occupation by a servant or agent and it has to be decided whether the servant or the employer should be regarded as the rateable occupier; (2.) lodgers—whether the lodger is in occupation of a separate part of the house or the landlord is in occupation of the whole; and (3.) where a contractor goes on to the land to do work for somebody who, until then, was the occupier. On this third question there is no authority binding on this court. The law has developed on the basic principle that there must be beneficial occupation. In *Reg.* v. *St. Pancras Union* (2) Lush J. defined rateable occupation in language which for many years has been approved: "Occupier includes possession as its "primary element, but it also includes something more. Legal "possession does not of itself constitute an occupation. The "owner of a vacant house is in possession, and may maintain "trespass against anyone who invades it, but as long as he "leaves it vacant he is not rateable for it as an occupier. "If, however, he furnishes it and keeps it ready for habitation ". . . . he is an occupier though he may not reside in it one

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(1) [1948] 2 K. B. 116.

(2) (1877) 2 Q. B. D. 581, 588.

"day in a year. On the other hand a person who, without "having any title, takes actual possession of a house or piece "of land, whether by leave of the owner or against his will, "is the occupier of it. Another element, however, besides "actual possession of the land, is necessary to constitute the "kind of occupation which the Act contemplates, and that is "permanence . . . . A transient, temporary holding of land "is not enough to make the holding rateable. It must be an "occupation which has in it the character of permanence— "a holding as a settler not as a wayfarer. These I take to be "the essential elements of what is called a beneficial or "rateable occupation." It is clear from that pronouncement that the person visibly using the land is not necessarily the rateable occupier. The position of the contractor was considered by the courts in *Mitchell Brothers, Ld.* v. *Worksop Union* (1) *In re Knott and Cardiff Corporation* (2), but those cases are not very helpful here. The facts in *Cleveland Bridge & Engineering Co., Ld.* v. *Darlington Union* (3) are closely similar to those in this case, but so far as the decision there was founded on *Smith* v. *Lambeth Assessment Committee* (4) it is no longer an authority. *Westminster Council* v. *Southern Ry. Co. and W. H. Smith & Son, Ld.* (5) was decided under a special statute, the Railways Valuation Act, and the specific question which arose for decision was whether certain premises were so let out as to be capable of separate assessment. In the present case the building contractor is brought on to the site for the purposes of the building owner, and the control of the building owner, through his superintending officer, over the very purposes for which the contractor is brought there, is almost absolute. The contractor cannot exclude the building owner from the site or these particular buildings. For all practical purposes he is nothing more than a servant using special tools and machinery and doing something for the building owner on the building owner's land. Occupation to be rateable must be something more than occupation by a subordinate for the purpose of the predominant occupier. It is impossible in the circumstances of the present case to say that the contractors are in exclusive occupation. There is an entire absence of any of the essential qualifications found in *Westminster Council* v. *Southern Ry. Co.* (5).

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(1) (1904) 1 Konstam's Rating Appeals, 1904–8, pp. 181, 182.
(2) [1918] 2 K. B. 146.
(3) (1923) 21 L. G. R. 511.
(4) (1882) 9 Q. B. D. 585.
(5) [1936] A. C. 511.

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John Laing & Son, Ld. v. Assessment Committee for Kingswood Assessment Area.

Rowe K.C. and *Squibb* for the rating authorities. There are four essential elements in rateable occupation. There must in the first place be actual possession by the alleged occupier. Secondly, the possession must be exclusive for the particular purposes of the occupier. Thirdly, the possession must be of some use or value or benefit to the possessor, and fourthly, the possession must not be for too transient a period. All those elements are to be found in the present case. How the court has to approach the question, so far as those ingredients of rateable occupation are concerned, is summed up in the speech of Lord Russell of Killowen in *Westminster Council* v. *Southern Ry. Co. and W. H. Smith & Co., Ld.* (1). Firstly, the nature of the de facto occupation of the occupier must be considered, and in essence that is a question of fact. Secondly, the court must look at the particular site, hereditament or buildings in respect of which occupation is alleged. It is not sought to say in the present case that the contractors were in legal possession of the site. All that is being done is to rate certain pieces of land which are being used by the contractors for their particular purposes. The *Southern Railway* case unquestionably altered fundamentally the way in which "occupation" cases were dealt with. The question in issue here is whether, if a contractor brings upon the site buildings or other forms of construction which he needs to help him to carry out his contract efficiently, those structures are in his rateable occupation?

[TUCKER L.J. If you are right about this it does not seem to me that the question of paramount occupation arises.]

So far as we know from the case there is no other rateable occupation. It is the occupation rights of the particular sites that have to be looked at. The mere fact that the contractor is required to comply with certain conditions puts no restriction on his exclusive possession. None of the conditions of the contract affects his occupancy rights in the least. It is a control not on occupancy but on the way in which the contract is carried out. The contractor has had exclusive possession of these buildings for a period which cannot be described as transient, and the decision of the Divisional Court should be upheld.

Harold Williams K.C. in reply.

Cur. adv. vult.

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(1) [1936] A. C. 511.

Dec. 20. TUCKER L.J. This is an appeal from a judgment of the Divisional Court on a special case stated under Baines' Act, with regard to the rateability of certain hereditaments which were being used by the contractors, John Laing & Son, Ld., for the purposes and in the course of the carrying out of a contract into which they had entered, for the making and extension of certain runways at Filton Aerodrome for the Air Ministry. The Divisional Court decided that the contractors were in rateable occupation of these hereditaments, and the case was accordingly remitted to quarter sessions with the opinion of the court so expressed. The matter was described by the Lord Chief Justice in general terms as follows: "The "appellants, Messrs. John Laing & Son, Limited, who are large "public works contractors, have undertaken a contract with "the Secretary of State for Air for the construction of runways "and various other matters, which it is unnecessary to detail, "at Filton Aerodrome. The provisions of the contract require "the contractors to do certain things which necessitate "the putting up of buildings. Whether they are huts or whether "they are made of breeze or whether they are made of brick, "seems to me to be immaterial. No one suggests that these "buildings are likely to be permanent buildings, in the sense "that they will remain on after the work of construction has "been done. In fact, the contract provides that at the end "of the work of construction these buildings and other erections "some of which are really foundations for the purpose of "mounting the very heavy machinery which is necessary for "this place, are to be taken away and, indeed, the superintending "officer, who is in the service of the Crown, can order them to "be taken away at any minute."

The case sets out in para. 5 that the work, the nature of which is set out in the conditions of contract and in the specification, and bills of quantities, involved "the strengthening, widening "and lengthening of the east-west runway and the preparation "of the landing ground and demolition of buildings at Filton "aerodrome in the county of Gloucester." Paragraph 6 states: "On the 26th June, 1946, a part of the site was handed "over to the appellants for the assembly of plant and offices, "and the remainder of the site on which constructional work "is to be carried out under the said contract was handed over "in sections as it became available. The contract date for "completion was the 26th May, 1947, (being eleven months "from the 26th June, 1946) but circumstances have arisen "which entitled the appellants to an extension of time under "the said contract and it is not expected that the works will "be completed until the end of March, 1948, though sections of "completed work may be handed over to the authority before "that date." I may say at this point that the whole of this case is stated on the assumption, as I read it, that these hereditaments are rateable hereditaments. There is nothing in the case which would entitle us to draw any distinction between any one of them, except in so far as any distinction can be obtained from the contract. What I mean is that it may be open in other cases of a similar nature to argue that some of these buildings or erections, or what I may call for convenience hereditaments, are of such a nature that, whatever their occupation, they are not capable of being rated. But no point is taken in this case with regard to that. Nothing that I am deciding can be quoted as an authority for the proposition that anything which answers the description of some of these places or erections is, as a matter of law, in all the circumstances, rateable.

The decision in this case primarily depends on the proper construction to be put on the general conditions which form the contract between the parties. The point taken before us for the plaintiffs is that which appears in para. 19 (A) of the case, namely, "They are not the occupiers of the said premises; "that their use of the same is subject to the control and "directions of the said superintending officer, and that they "have not paramount occupation thereof." That is the point that has been argued in this court. But it would appear that that point had not figured, at any rate prominently, in the argument in the court below, which had primarily been directed to the contentions which appear in para. 19 (B), namely, "If they are occupiers of the said premises or any of "them, such occupation is not beneficial" for the reasons which are then set out.

Mr. Rowe has said that there are four necessary ingredients in rateable occupation, and I do not think there is any controversy with regard to those ingredients. First, there must be actual occupation; secondly, that it must be exclusive for the particular purposes of the possessor; thirdly, that the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period. The primary question here is whether the plaintiffs are in actual occupation and exclusive occupation of these particular hereditaments.

Mr. Williams argues that, on examination of the contract between the parties, it will be found that they are not in exclusive possession. Although at the outset this case was presented rather as one in which there were competing occupants, or there might be persons who could be regarded as competing occupants, and the question was whose was the paramount occupancy, I think the point is more accurately stated in the way in which Mr. Williams put it in his final address: not whether there are competing occupants, but is there any real occupation by the appellants, or is not the true position that they are really in occupation on behalf of someone else, namely, the Crown, for whose purpose, he says, they are on the site carrying out the works in question. Mr. Williams says this is a case more like the occupation of a servant than such cases as *Westminster Council* v. *Southern Ry. Co. and W. H. Smith & Co. and Others* (1), to which I shall have to refer shortly, where the railway company was admittedly in occupation of the whole of Victoria Station, but certain portions of it were held to be in rateable occupation of other persons, either as tenants or licensees.

For the purpose of solving this question it is necessary to look with care, and in some detail, at the contract. I do not propose to read all the conditions relied on; but in the abstract of particulars, which appears in the appendix to the case, which is to be read in conjunction with the general conditions of contract, it is provided: "The date of completion shall be "the date of the day after the expiration of a period of eleven "months from the date on which possession of the site is given "to the contractors." Turning to the conditions, we find in para. 1, the definition paragraph, in sub-para. (*b*): "'The "'site' shall mean the lands and/or other places on, into or "through which work is to be executed under the contract or "any adjacent land, path or street which may be allotted or "used for the purpose of carrying out the contract." The conditions which are material are Nos. 3, 6, 7, 13, 16, 17, 18, 19, 26, 33, 36, 44, 56 and 57. Condition 3 provides that all materials and equipment brought on to the site in connexion with the contract, "shall become the property of and vest in "the authority." That is dealing with property, of course, whereas we are concerned with occupation. Condition 6 provides: "Possession of the site or the order to commence "shall be given to the contractor by notice in writing, and the

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(1) [1936] A. C. 511.

" contractor shall thereupon commence the execution of the " works and shall proceed with diligence," etc. Condition 7 provides : " The contractor shall carry out and complete the " execution of the works to the satisfaction of the super-" intending officer, who may from time to time issue further " drawings, details and/or instructions, directions and " explanations " (all of which are hereafter collectively referred to as " the S.O.'s instructions."). Then there are enumerated a number of matters with regard to which he can give those instructions. They include the removal from the site of any materials ; the removal or re-execution of work ; the dismissal of any foreman or person below that grade employed in connexion with the contract ; the use of materials obtained from excavations on the site ; and " any " other matter as to which it is necessary or expedient for " the superintending officer to give instructions, directions " or explanations." It provides that the decision of the superintending officer " that any such instructions are necessary " or expedient," shall be final and conclusive.

Condition 13 deals with materials and workmanship and provides : " The superintending officer and his representatives " shall have power at any time to inspect and examine any " part of the works or any materials intended to be used in or " on the works either on the site or at any factory or workshop " or other place where such parts or materials are being " constructed or manufactured or at any place where the same " are lying or from which they are being obtained, and the " contractor shall give all such facilities as the superintending " officer may require to be given for such inspection and " examination." Condition 16 deals with the hours of work and provides that they shall be subject to the approval of the superintending officer. Conditions 17, 18 and 19 are dealing with watching, lighting and protection of works, precautions to prevent nuisance, and the removal of rubbish. Those are all obligations put upon the contractor. He is to provide all watchmen necessary for the protection of the site. He is to take reasonable precautions to prevent nuisance or inconvenience to the owners, tenants or occupiers of other premises ; and he is to keep the site free from rubbish. Condition 26 provides : " All plant, temporary buildings, equipment and " things on the site provided by or on behalf of the contractor " for the construction of but not for incorporation in the works " shall stand at the risk and be in the sole charge of the

" contractor, and the contractor shall be responsible for, and " with all possible speed make good, any loss or damage " thereto arising from any cause whatsoever, including the " accepted risks." Condition 33 provides: " The contractor " shall employ a competent agent to whom directions may be " given by the superintending officer. The agent shall super- " intend the execution of the works generally with such " assistance in each trade as the superintending officer may " consider necessary." Condition 36 gives the superintending officer power to require the contractor " immediately to cease " to employ . . . . any foreman or person below that grade " whose continued employment thereon is in the opinion of the " superintending officer undesirable." Condition 44 (2.) (A) (iii.) is relied upon, which provides that the authority shall " as " soon as practicable, and in any case not later than the " expiration of three months from the date of such notice " —that is of the notice to determine the contract, the giving of which the authority has power to do—" or of the period up to " the date for completion, whichever is the shorter, give " directions (with which the contractor shall comply with all " reasonable dispatch) as to all or any of the following matters," which includes " (iii.) removal of all plant, temporary buildings " and equipment from the site." It is to be observed, however, that that is dealing with something which is to happen on the determination of the contract and, in my view, accordingly is not so material as some of the other conditions.

Finally, we come to conds. 56 and 57 which are dealing with security matters. Condition 56 provides: " The contractor " shall take all reasonable steps to ensure that no alien, or " person of dual nationality, unless the prior permission in " writing of the authority has been obtained, shall be admitted " to the site. The superintending officer shall have power to " exclude from the site any person whose admission thereto " may in his opinion be undesirable for any reason what- " soever." Condition 57 deals with the issuing of passes, which is in the hands and under the authority of the superintending officer.

It is said by Mr. Williams that the very extensive powers conferred upon the superintending officer are such that the contractors cannot be regarded as being in exclusive occupation of this hereditament. He seeks to distinguish this case on its facts from the Southern Railway case (1).

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(1) [1936] A. C. 511.

It is common ground that the principles to be applied to these facts are now to be found in the case which we call the *Southern Railway* case, the full description of which is *Westminster Council* v. *The Southern Ry. Co. and W. H. Smith & Son, Ld. and Others* (1). I need not refer in detail to the facts of that case, which will be found conveniently set out on pp. 513 and 514, but the principles are stated in the speech of Lord Russell of Killowen on p. 529, where he says this: "In the next place I would make a few general observations "upon rateable occupation. Subject to special enactments, "people are rated as occupiers of land, land being understood "as including not only the surface of the earth but all strata "above and below. The occupier, not the land, is rateable; "but, the occupier is rateable in respect of the land which he "occupies. Occupation, however, is not synonymous with "legal possession: the owner of an empty house has the legal "possession, but he is not in rateable occupation. Rateable "occupation, however, must include actual possession, and "it must have some degree of permanence: a mere temporary "holding of land will not constitute rateable occupation. "Where there is no rival claimant to the occupancy, no "difficulty can arise; but in certain cases there may be a rival "occupancy in some person who, to some extent, may have "occupancy rights over the premises. The question in every "such case must be one of fact—namely, whose position in "relation to occupation is paramount, and whose position in "relation to occupation is subordinate; but, in my opinion, "the question must be considered and answered in regard to "the position and rights of the parties in respect of the "premises in question, and in regard to the purpose of the "occupation of those premises. In other words, in the "present case, the question must be, not who is in paramount "occupation of the station, within whose confines the premises "in question are situate, but who is in paramount occupation "of the particular premises in question." Then at p. 532 he says: "In truth the effect of the alleged control upon the "question of rateable occupation must depend upon the facts "in every case and in my opinion in each case the degree of "the control must be examined, and the examination must be "directed to the extent to which its exercise would interfere "with the enjoyment by the occupant of the premises in his "possession for the purposes for which he occupies them,

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(1) [1936] A. C. 511.

" or would be inconsistent with his enjoyment of them to the " substantial exclusion of all other persons." I emphasize the words " would interfere with the enjoyment by the occupant " of the premises in his possession for the purposes for which he " occupies them." At p. 533 Lord Russell says: " In my " opinion the crucial question must always be what in fact is " the occupation in respect of which someone is alleged to be " rateable, and it is immaterial whether the title to occupy is " attributable to a lease, a licence, or an easement."

Lord Wright, in his speech, says, referring to *Cory* v. *Bristow* (1): " The decision is important as showing that a " person no less occupies in the rating sense because he does so " subject to regulations or by-laws or is liable to be turned out " on short notice." Further on, after quoting from that case, he says: " And further Lord Cairns also refers to the " fact that Messrs. Cory were to work to the satisfaction of the " conservators under the inspection of the harbour master: " he points out that Messrs. Cory were none the less in rateable " occupation because they were required to obey the conser- " vators' by-laws, and were to work to the satisfaction of the " conservators and subject to definite limitations, and were " liable to be ejected on notice." At p. 555 he says: " The " railway company have no doubt quite properly imposed such " restrictions as seemed necessary for the proper working of " the station as a whole. They have reserved the right to close " the station each night, and also a special right to close " temporarily in cases of emergency: but these are merely " restrictions on the tenants' user and enjoyment, and do not " change their character or make the occupation other than a " sole and exclusive occupation. The tenant is still in sole " occupation of his premises, and has full use of them to carry " on his business. As one indication of this I may refer to the " terms of the agreements which give the railway company " limited rights of entering for specific purposes, e.g., to view " the state of repair, and so forth. These terms indicate a " possession in the tenant adverse to the landlord." After quoting from the *Holywell Union* v. *Halkyn District Mines Drainage Co.* (2), he says: " As to the closing of the station " at night, this is done outside business hours, and as " MacKinnon J. shrewdly observes, is rather an advantage to " the tenants, because it tends to obviate the risk of burglary " to which lock-up shops in public thoroughfares are peculiarly

(1) (1875) L. R. 10 C. P. 504. (2) [1895] A. C. 117.

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John Laing & Son, Ld. v. Assessment Committee for Kingswood Assessment Area.

Tucker L.J.

"exposed. It is obvious that the tenants' occupation is "continuous, because at night he occupies by his goods. The "tenant is the person entitled to exclude trespassers, e.g., "from the bank or Boots' shop, or to bring ejectment."

Those are the general principles which we have to endeavour to apply to the facts of this particular case. We have to ascertain what is the quality of the occupation. If the contractors are occupying these hereditaments for the purposes and the sole purposes of their business, and if the measure of control retained by the Ministry is not such as to alter the character and quality of their occupation, then, in my view, they are in rateable occupation. I think it has been rightly stressed that what one has to determine is the quality of the occupation of the premises. The measure of control by the Ministry in carrying out the contract is a different thing from a control interfering with the exclusive occupation of the hereditament. On reading the conditions in this contract, and comparing it with the *Southern Railway* case (1) and the principles there enunciated, the conclusion I have arrived at is that the Ministry had not in this case such control as to render the occupation of the contractors an occupation which is not rateable. In other words, I think the real control exercised by the Ministry was a control with regard to the performance of the contract and not a control which interfered with the exclusive occupation of these hereditaments for the purposes of their work by the contractors.

Before passing from the case it is necessary to say a word about the decision of the Divisional Court in *Cleveland Bridge & Engineering Co., Ld.* v. *Darlington Union Assessment Committee* (2). That was a case which in many respects is very similar to the present case, but I think when the judgments are looked at it is clear that they are based, or two of them at any rate are based, entirely, on the decision in *Smith* v. *The Lambeth Assessment Committee* (3), which case can no longer be regarded as binding since the decision of the House of Lords in *Westminster Council* v. *Southern Ry. Co., etc.* (1). Branson J., who gave the third judgment in the *Darlington* case (2), though he spoke of the undisputed principle of law which applied to that case, that undisputed principle appearing to be that laid down in *Smith* v. *The Lambeth Assessment Committee* (3), none the less based his judgment on *Holywell*

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(1) [1936] A. C. 511.

(2) 21 L. G. R. 511.

(3) 9 Q. B. D. 585.

Union v. *Halkyn District Mines Drainage Company* (1), putting it on the basis of paramount and subordinate occupation. However that may be, the *Darlington* case (2) was cited to their Lordships in the *Southern Railway* case (3), and I think can no longer be regarded as good law. For these reasons, I think this appeal fails and must be dismissed.

Asquith L.J. I entirely agree and have nothing to add.

Jenkins J. I also agree. Adopting Mr. Rowe's four factors or ingredients of rateability, it is obvious on the facts here that the first is satisfied, because the contractors were clearly in actual possession of the hereditaments claimed to be rateable. Secondly, I think that their possession was exclusive for the particular purposes for which they occupied the premises, namely, the carrying out of the contract. I think that the exclusive character of their possession appears if the distinction is kept clearly in mind between general control exercised by the superintending officer over the site as a whole, and the general carrying out of the contract, on the one hand, and the position with regard to particular parts of the site alleged to be in the occupation of the contractors. So far as those particular parts of the site were concerned, it seems to me that their possession was none the less exclusive because they were subject to the general controlling authority of the superintending officer. Thirdly, it is said that the possession must be of some use or value or benefit to the possessor; but as to that it seems to me enough to say that the contractors occupied those premises for the purposes of their business, and it seems to me to be quite immaterial that their business in this connexion consisted of the carrying out for reward of a particular constructional project. Fourthly, it is said the possession must not be for too transient a period. I think that fourth requirement is met by the fact that the work has taken a matter of two years to carry out. All four tests, therefore, being satisfied, I agree that the appeal fails and should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors for plaintiffs: *Masons.*

Solicitors for rating authorities: *Crossman & Co., Bristol; Field, Roscoe & Co., for Guy H. Davis, Gloucester.*

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(1) [1895] A. C. 117.
(2) 21 L. G. R. 511.
(3) [1936] A. C. 511.

A. W. G.

C. A.

1949
Jan. 11.

Lord Greene M.R.,
Somervell and Singleton L.JJ.

WHITEHEAD *v.* JAMES STOTT & COMPANY.

Master and servant—Accident to servant in hoist—Latent defect in winding shaft—Hoist not of "sound material"—Breach of statutory duty—Factories Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 22, *sub-s.* 1.

The Factories Act, 1937, s. 22, sub-s. 1, provides: "Every "hoist or lift shall be of good mechanical construction, sound "material and adequate strength and be properly maintained."

Held that the obligation for a hoist or lift in a factory to be of sound material was absolute.

When, therefore, an accident happened causing injury to a workman using a hoist in a factory owing to a latent defect in the winding shaft, which on the evidence was in the shaft when the hoist had been installed many years before, the occupiers of the factory were liable for breach of statutory duty. It would not be enough that when the hoist was first installed it was found on reasonable inspection to be of sound material for the purpose.

Appeal from Mr. Commissioner Ormerod.

The plaintiff was employed by the defendants as a labourer at their cotton mills called Werneth Mills at Werneth, Oldham. On January 15, 1947, he was carrying weft to weavers employed in the factory and for this purpose was operating and travelling in the cage of an electrically powered hoist from the ground floor to a higher floor when the cage fell and the winding gear fell on his head and injured him. On June 10, 1947, the plaintiff brought proceedings aganst the defendants alleging (among other things) a breach by the defendants of their statutory duty in that the hoist was not of good mechanical construction, sound material and/or properly maintained as required by s. 22, sub-s. 1, of the Factories Act, 1937. There was a difference as to the cause of the accident. The plaintiff alleged that owing to an electrical defect the cage ran right to the top and struck the mechanism at the top twice after which the cage fell and part of the mechanism fell also and struck him on his head. The defendants alleged that owing to a latent defect in the winding-up shaft it broke and caused the accident.

The commissioner held on the evidence that the defendants' explanation of the accident was correct. It was agreed that there were signs of a latent defect in the winding gear and a witness called on behalf of the defendants said it was a defect probably in the winding shaft when it was first installed many years before. He was unable in these circumstances to hold that the shaft was of sound material and he must hold that there was a breach of s. 22, sub-s. 1, of the Act, entitling the plaintiff to damages which he fixed at the total amount of 875*l*.

The defendants appealed.

Basil Nield K.C. and *C. M. W. Elliot* for the defendants. The defendants have not been guilty of any breach of their statutory duty under s. 22, sub-s. 1, of the Factories Act, 1937, seeing that the plaintiff's injury was due to a latent defect which caused an inevitable accident. The judge was wrong in deciding that the defendants failed to install a lift of sound material. It was true that there was a latent defect but the hoist had been working without any accident for some twenty-five years. The latent defect was undiscoverable except by X-ray or electric test. The decision in the court below amounts to a holding that under s. 22, sub-s. 1, there was an absolute duty to install every hoist of sound material. That is only so when a duty is imposed " to take effective steps " to prevent or to ensure, as in some other sections, when the duty reaches almost an insurance level : see s. 24, sub-s. 7. It is contended (1.) that when the duty imposed is absolute some special and express words are used, and (2.) that the occupiers of a factory are not insurers as the liability found by the judge practically involved. *Davies* v. *Thomas Owen & Co.* (1) indicates the high water mark of the obligation imposed. The question arose whether the obligation to fence was absolute although mechanically impossible : see *Lewis* v. *Denye* (2).

[LORD GREENE M.R. That case related to a circular saw which could not be completely fenced. There is no such difficulty here.]

In *Reilly* v. *William Beardmore & Co.* (3), s. 23 of the statute was dealt with.

[SOMERVELL L.J. That does not really help.]

The only case similar to the present one, except that it related to the maintaining of a lift, is *Miller* v. *Galashiels Gas Co.* (4) in which one of the judges doubted whether the obligation was absolute. On the question whether the material used to instal the hoist was sound, all that is required is that it should be sound for the purpose and that it has been found to be sound on reasonable inspection in the sense of being sound for the purpose. That test has been satisfied here and the appeal ought to be allowed.

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(1) [1919] 2 K. B. 39.

(2) [1940] A. C. 921, 931.

(3) 1947 S. C. 275 ; S. L. T. 147.

(4) 1948 S. L. T. 282.

Denis Gerrard K.C. and *J. di V. Nahum* for the plaintiff were not called upon.

Lord Greene M.R. The question raised by this appeal resolves itself into the question of the true ambit of s. 22, sub-s. 1 of the Factories Act, 1937. The provisions of that section are new and make more rigorous the obligations of the occupiers of a factory in regard to lifts or hoists. The sub-section provides, "Every hoist or lift shall be of good mechanical "construction, sound material and adequate strength, and "be properly maintained."

No attempt was made before us to dispute the correctness of the finding of fact of the commissioner but it is argued for the defendants that the sub-section of the Factories Act which I have read did not impose any liability upon the occupier of the factory in respect of this particular accident. The sub-section imposes a liability to see that every hoist or lift shall be of sound material and adequate strength and properly maintained. But it is said generally, that, in approaching the construction of that section, it must be borne in mind that authorities which have found in other provisions of the Factories Act an absolute obligation to take some precaution must be construed as based on the presence of phrases such as "take effective measures to prevent," and that an absolute obligation, in the absence of some such phrase as that, must not be read into the words of the sub-section.

At the outset (and this, of course, does not involve rejecting the appeal) I may say that I am completely unconvinced by that argument. No case has been cited to us which really justifies the view that it is necessary to have some special form of words to create what has so frequently been referred to in these Factory Act cases as an absolute obligation. The well-known decision of Salter J. in *Davies* v. *Thomas Owen & Co.* (1), was indeed referred to, but I find nothing in that judgment to suggest that the learned judge, in finding an absolute obligation, relied on any such special language. Here I can see no reason prima facie for limiting the construction of the words "sound "material" to anything but sound material. The obligation is quite clearly expressed, "shall be of sound material."

But that is only on the threshold of the argument, because the heart of it is really to the following effect. This shaft, it is said, complied with the obligation to provide sound material

(1) [1919] 2 K. B. 39.

in that, when it was installed, it was sound for its purpose. That proposition really implies that "sound" must mean "sound on the facts" and not "reasonably appears to be "sound." The thing may reasonably appear to be sound when it is perfectly unsound, and Mr. Nield rather resiled from that limited interpretation of his argument; and he explained that his argument really involved that the material would be sound material, if it appeared on reasonable inspection to be sound for its purpose. It is to be observed that this introduces a quite different test from the test of soundness in fact. Appearance on reasonable inspection to be sound, may be consistent with unsoundness in fact. That appears to me to be the only logical way in which he could put his case. But I ask myself, what justification is there for introducing that gloss on two lines of perfectly plain English, saying, "Every hoist or lift shall be "of sound material." I can see no reason for writing a gloss on that, a gloss which, I might say, would, in my view, be quite inconsistent with the general objects of the Factories Act as explained in a great number of cases. The argument was that the sub-section fell into two parts, the one relating to the original installation, and the other to subsequent maintenance. It was said that on the original installation it would be sufficient that the material appeared on reasonable inspection to be sound for its purpose. "Its purpose," of course, when one starts to examine it, is a complex conception. It is partly composed of what I may call a mechanical factor—that is to say, whether it can raise and support the lift—and partly of a time factor—whether it can do it for some contemplated period of time. There is no evidence here as to what the contemplated life of a lift of this kind ought reasonably to be, but in fact the defendants used it for, it is said, twenty-five years and at the end of that period this defect appeared. My real reason for rejecting the formula put forward on behalf of the defendants is that it introduces a qualification on the basis of reasonable inspection in the place of an absolute qualification of soundness. I cannot read the sub-section as referring to anything but an absolute test of soundness. I need not say anything on the subject of the meaning of "properly maintained." It was suggested that that merely imported the absence of negligence, a duty of reasonable care. I may say at once that I must not be taken as accepting that argument, but I do not find it necessary to discuss it.

In my opinion, the learned commissioner was perfectly right

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when he decided that on the facts of this case the material when the lift was installed was not sound material, and he properly instructed himself on the law when he held that that fact constituted an infringement of the provisions of the subsection. The appeal must be dismissed.

SOMERVELL L.J. I agree.

SINGLETON L.J. I agree.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester; Gibson & Weldon, for John Whittle, Robinson & Bailey, Manchester.*

H. C. G.

Approved. FOWLER *v.* BRATT. [1950] 1 All E.R. 662.

Overruled. GRAHAM & SCOTT *v.* OXLADE [1950] 2 K. B. 257

1948
Nov. 3.

Hilbery J.

BENNETT AND PARTNERS *v.* MILLETT.

Principal and agents—Estate agents commission—Commission payable "in the event of our introducing a purchaser who is able and willing "to complete the transaction"—Introduction by agents of person able and willing to purchase—Agreement by that person to purchase "subject to contract"—Refusal by owner to complete—Whether agents' commission payable.

Estate agents were employed to sell a house on the terms that their commission should be payable on their introducing "a purchaser who is able and willing to complete the transaction." They found a person who was able and willing to pay the stipulated price. That person signed a memorandum "subject to contract" agreeing to buy at that price and paid the estate agents the usual deposit of 10 per cent. Later the owner of the house refused to complete. In action by the estate agents for their commission:—

Held, that the word "purchaser" did not in the context mean one who had actually completed the purchase, but was qualified by the words "who is able and willing to complete the transaction," which could not be treated as surplusage: and therefore in introducing a person who was able and willing to purchase, the agents had performed their obligations under the contract and were entitled to their commission.

Luxor (Eastbourne), Ld. v. *Cooper* [1941] A. C. 108 and *Jones* v. *Lowe* [1945] K. B. 73 distinguished.

Giddys v. *Horsfall* [1947] 1 All E. R. 460 applied.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

ACTION.

The following statement of facts is taken from the judgment of HILBERY J.: On June 16, 1947, the defendant Robert M. Millett went to the offices in Croydon of the plaintiffs, who are auctioneers and estate agents, and instructed them to sell a property belonging to his wife known as "St. Martins," No. 24, Mapledale Avenue, Shirley, Croydon, for 8,500*l*. unfurnished.

The following day, namely, June 17, 1947, the plaintiffs wrote a letter to the defendant in these terms: "Dear Sir, "St. Martins, Mapledale, Shirley. Further to your call at our "offices this afternoon we write to confirm and thank you for "your instructions for us to dispose of the freehold of the "above premises at a figure of 8,500*l*. Vacant possession to "be given on completion of the purchase. We confirm that "in the event of our introducing a purchaser who is able and "willing to complete the transaction, our commission will "be in accordance with the recognized scale of the Auctioneers' "and Estate Agents' Institute, namely, 5 per cent. on the "first 300*l*. of the purchase price, 2½ per cent. on the next "4,700*l*. and 1½ per cent. on the residue. We should like to "make an inspection of the property in the near future, and "will telephone to you for an appointment as arranged with "our Mr. Bennett."

Following that letter the defendant arranged a date on which the plaintiffs made their inspection of the premises and took all the particulars that they wished; and the agents entered the particulars of the property on their books and advertised it in local newspapers. There was no demur by the defendant to the terms of that letter; no answer was sent by him to it, but following it he allowed the agents to go on busying themselves in an effort to find a purchaser for the property.

Subsequently, the plaintiffs, with the consent of the defendant, authorized a sub-agent to seek a person able and willing to pay the price of the property, and that sub-agent found a Mrs. Bell who was willing and able to pay what the defendant finally instructed the plaintiffs was his wife's minimum price; that was 7,500*l*. Mrs. Bell signed an agreement "subject to contract" to purchase at that price and paid a deposit of 750*l*. Solicitors on each side were instructed, and finally, notwithstanding the pressure which Mrs. Bell was bringing to bear on the defendant's wife to go on with the matter to enable her to take possession, the defendant's wife refused to go on because she could not find alternative accommodation.

The plaintiffs in those circumstances demanded their commission and on the defendant refusing to pay it brought this action.

In his defence, the defendant raised certain issues of fact, which were decided against him, and pleaded that the agreement to pay commission was conditional on a purchase actually taking place.

Sir John Cameron for the plaintiffs. Although the word " purchaser " used alone must mean someone who has in fact purchased, this word could be qualified by other suitable words so as to have an extended meaning. In this case the word was qualified by other words which were mere surplusage, unless they extended the meaning of " purchaser " to cover the case of someone who intended to purchase and was able to purchase, but did not do so on account of a frame of mind on the part of the vendor. To call such a person a " purchaser " did not involve an undue straining of language, as the words " vendor " and " purchaser " are normally used to describe the respective parties during the course of the negotiation.

To interpret the words in the letter of June 17, 1947, as meaning a " would-be purchaser " or a " prospective " purchaser " who wished or was able to purchase is accordingly a more apt interpretation than to regard the words which follow the word " purchaser " as meaningless or mere surplusage.

Patrick Back for the defendant. The phraseology in the letter of June 17, 1947, of the words " in the event of our " introducing a purchaser who is able and willing to complete " the transaction " is a combination of two phrases which have already received judicial consideration, namely (1.) " in " the event of our introducing a purchaser " considered in *Jones* v. *Lowe* (1) and (2.) " in the event of our being instru- " mental in introducing a party prepared to purchase " considered in *Giddys* v. *Horsfall* (2). In the first case Hilbery J. following the case of *Luxor* (*Eastbourne*), *Ld.* v. *Cooper* (3) held that the word " purchaser " meant a person who had completed the purchase, and accordingly the mere introduction of a prospective buyer did not entitle the estate agents to recover a commission. In the second case it was held that the

(1) [1945] K. B. 73.
(2) [1947] 1 All E. R. 460.
(3) [1941] A. C. 108.

agent was entitled on the language used to recover a commission on such an introduction. The governing word in the phrase used in this case is " purchaser " and the ensuing words are surplusage. Accordingly this case is governed by *Jones* v. *Lowe* (1) and no commission is payable.

HILBERY J. The sole point really in this case is the construction of the letter of June 17, the terms of which were accepted by the defendant. It is an odd thing that in face of the decision on the meaning of the word " purchaser " in *Luxor (Eastbourne), Ld.* v. *Cooper* (2) and in contradistinction to it the decision of Lewis J. in the case of *Giddys* v. *Horsfall* (3), that the letter should have been written in this form. To put it quite shortly, in the *Luxor* case (2) the court held that where an agent contracts for a commission to be paid to him on finding a purchaser, he must find someone who, in fact, completes a purchase. In the *Giddys* case (3), where the agents stipulated for their commission as becoming payable to them in the event of their being instrumental in introducing a party prepared to purchase on the terms of the vendor's instructions or on terms acceptable to him, the court held that a contract so worded did not require the agents to find someone who actually completed a transaction of sale and purchase but was such that they could perform the duties they had to perform and earn their commission if, in accordance with the exact terms of the contract they introduced a party prepared to purchase on the terms of the instructions given to them, or on terms acceptable to the vendor.

In this case, almost as though it were intended to set a fresh problem for the courts, the agents chose to use language which seems to fall somewhere between those two decisions, for here the language which the agent chose to use is : " in " the event of our introducing a purchaser who is able and " willing to complete the transaction."

Now no person can be a purchaser in the strict sense of the word (and as construed by the House of Lords in the *Luxor* case (2)) unless he completes the purchase. He cannot complete the purchase unless he has been ready and willing to do it at all times. I cannot conceive of a purchaser who actually buys who was not ready and willing to buy and able to buy inasmuch as he pays the price which has been asked ; and, in consequence of that, Mr. Back, in the able argument which he addressed to

(1) [1945] K. B. 73.
(2) [1941] A. C. 108.
(3) [1947] 1 All E. R. 460.

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me on behalf of the defendant, said that those words following the word "purchaser" in this contractual letter ought to be taken to be surplusage, and merely otiose. He argued that those words should be struck out, and the contract should be construed strictly against the persons putting forward that letter. He said that they had chosen to speak of a purchaser before adding to that word of description these qualifying words "able and willing to complete the transaction," and that therefore the qualifying words should be disregarded.

I have given careful consideration to that contention, but I do not think it would be right to give effect to it. Having considered these words very anxiously, in my view the words "able and willing to complete the transaction" obviously indicate a qualification of the word "purchaser" which would not otherwise be there. The courts have said that to speak of a purchaser without any other words, is to speak of one who actually does complete the contract of sale and purchase; but in common parlance one does not always speak of a purchaser in that limited sense of the word. "Buyer" certainly is a word of description in many great firms for a person holding a general office of buying for the firm, and he is a buyer; though he does not buy anything for months, he remains a buyer. Even in the language of the law the expression "buyer" is not necessarily confined in its application to one who has completed a purchase. There are instances in our law where the expression "buyer" is used without its being limited to a person who has completed a transaction and indeed to describe a person who may or may not act so as to complete a transaction of sale and purchase. For example s. 18 of the Sale of Goods Act, 1893, speaks in terms of goods delivered to the "buyer" "on approval" or "on sale or "return," or other similar terms and goes on to provide when in such circumstances the property will pass to "the "buyer." There, it is to be observed, the law speaks of a party as a "buyer" though that party has never agreed to buy and may never complete the transaction of purchase. In ordinary parlance, we do not use the word necessarily as restricted to a person who actually completes a transaction of purchase and sale; and here in this letter, I think, the very fact that they add the words "who is able and willing to "complete the transaction" shows that they are speaking of someone who is in the character of a buyer—who is taking the part, if I may borrow an expression from the stage, of a buyer, and is in a position to complete the transaction that

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is to say, to become in the full sense of the term as construed by the courts, an actual buyer who has completed the transaction of purchase and sale.

I think that those words are a clear indication that what the plaintiffs are offering is their services for finding and introducing a person who is able to buy at the figure asked by the defendant—a person who is willing and able to complete the transaction so as to become, in the strictest sense of the word, the purchaser. I think they are words of qualification which can be given a sensible interpretation, and should be given a sensible interpretation in the circumstances.

It is not without some hesitation, however, that I have come to that conclusion; but in the circumstances I think that there must be judgment for the plaintiffs because since I give the words that construction, the plaintiffs have earned their commission.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Kinch & Richardson, for Pringle & Co., Redhill.*

Solicitors for the defendant: *Clutton, Moore & Lavington, for A. Rawlence, Croydon.*

Applied. SIDNEY TRADING CO., LTD. *v.* FINSBURY B.C. [1952] 1 All E.R. 460.

ALLIANCE PROPERTY COMPANY, LIMITED *v.* SHAFFER.

C. A.

1949

Jan. 11, 12.

Tucker and Denning L.JJ. and Roxburgh J.

Landlord and tenant—Rent restriction—Standard rent—Rent reserved by lease—Additional payments reserved by supplemental agreement, recoverable by distress or otherwise as for rent in arrear—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*)*—Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1, *sch. I.*

A flat was let by the plaintiffs to the defendant in 1944. The rent reserved by the lease was admittedly higher than that allowed by the Rent Restriction Acts. By a lease dated May 31, 1934, the plaintiffs had previously let the flat to one D. at a rent of 175*l.*, but later on the same day the plaintiffs and D. had executed a second deed under which D. covenanted to pay a further 100*l.* per annum to the plaintiffs, of which 40*l.* was in consideration of decorative and other alterations which the plaintiffs had made to the premises, and 60*l.* was payable towards the cost of the management of the building. The second deed was described on the back as a supplemental agreement. It provided that it was to operate

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concurrently with the lease and that amounts payable under it were to be recoverable by distress or otherwise as for rent in arrear. On September 1, 1939, the material date for ascertaining the standard rent, D. was tenant of the flat under a yearly tenancy, in substitution of the original tenancy but on the same terms and conditions. The plaintiffs claimed arrears of rent from the defendant, the present tenant, on the footing that the standard rent was 275*l*. per annum, and the defendant counterclaimed rent overpaid on the footing that the standard rent was 175*l*. per annum. The trial judge held that the additional payment of 100*l*. per annum reserved under the supplemental agreement of May 31, 1934, was part of the " rent " within the meaning of s. 12, sub-s. 1(*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that the standard rent of the flat was therefore 275*l*. per annum. On appeal by the defendant :—

Held, that looking at the substance of the transaction as set forth in the two documents the additional 100*l*. was part of the monetary compensation payable by the tenant in consideration for that which had been granted to him by the landlord, and was " rent " within the meaning of the Rent Restriction Acts. The standard rent was therefore 275*l*.

Decision of Slade J. [1948] 2 K. B. 464, affirmed.

Dictum of Younger L.J. in *Wilkes* v. *Goodwin* [1923] 2 K. B. 105 as approved with modification by Court of Appeal in *Property Holding Co.* v. *Clark* [1948] 1 K. B. 630, applied.

Appeal from Slade J.

By a lease dated May 31, 1934, the plaintiffs let an unfurnished flat in Weymouth Court, London, to one Reginald Denham for seven years, at a rent of 175*l*. per annum. There was a proviso for re-entry should the rent be in arrear. Later on the same day another deed, endorsed as a supplemental agreement, was executed by the plaintiffs and Denham, reciting that the lessors had that day granted a lease of the flat to the lessee, that the lessors had made considerable decorative and other alterations to the premises, and that it had been agreed by the parties that, in consideration thereof, the lessee should contribute 40*l*. per annum during the period of his lease towards the cost of those alterations, in addition to the sum of 60*l*. per annum towards the cost of the management of the building. The operative part of the deed provided : " (1.) The lessee shall pay to the lessor the sum of 25*l*. [per " quarter] . . . . during the period of his lease together with " and as the rent reserved by the said lease becomes due. " (2.) This agreement shall run concurrently with the said " lease and shall be deemed at an end as and when the said " lease is terminated. (3.) All amounts payable hereunder

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" shall be recoverable by distress or otherwise as for rent in " arrear." There followed a provision that the agreement should be binding on the person or persons in whom the lease was, for the time being, vested.

On May 18, 1937, in reply to a letter from Denham, the plaintiffs agreed that he should become a yearly tenant as and from June 24 of that year " on the same terms and conditions " as your present tenancy." That yearly tenancy was still in existence on September 1, 1939, when, by s. 3 of the Rent and Mortgage Interest Restrictions Act, 1939, the Rent Restriction Acts became applicable to the flat.

After Denham's tenancy had determined the plaintiffs let the flat to the defendant, Bernard Shaffer, by a lease dated May 23, 1944, for three years from June 7, 1944, at a rent expressed to be 300*l.* per annum. By a memorandum endorsed on that lease, dated May 7, 1947, the parties agreed to extend the term of that lease for a further seven years, on the terms that the rent was to be increased to 325*l.* per annum.

The plaintiffs conceded that the rents of 300*l.* and 325*l.* per annum were irrecoverable under the Rent Restriction Acts, but contended that the " standard rent " of the flat under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), was 275*l.* per annum, and claimed in the present action arrears of rent on that footing. The defendant contended that the standard rent was 175*l.* per annum and counterclaimed for the return of rent overpaid.

Slade J. held that the additional 100*l.* per annum reserved under the second deed of May 31, 1934, was part of the rent within the meaning of s. 12, sub-s. 1 (*a*), of the Act of 1920 and that the standard rent of the flat was therefore 275*l.* per annum. The defendant appealed.

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*a*), as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 1 and sch. 1: " The expression ' Stan- " ' dard rent ' means the rent " at which the dwelling-house was " let on September 1, 1939, or, " where the dwelling-house was " not let on that date, the rent " at which it was last let before " that date, or, in the case of a " dwelling-house which was first " let after the said September 1, " the rent at which it was first " let."

Section 12, sub-s. 2, proviso (i.): " This Act shall not, save as other- " wise expressly provided, apply " to a dwelling-house bona fide " let at a rent which includes " payments in respect of board, " attendance, or use of furniture."

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Michael Hoare and *T. H. K. Berry* for the defendant. Where the rent of the property is fixed by a self-contained lease it cannot be altered by a second document. The additional payments in this case under the second deed were not part of the "rent" within the meaning of that word in s. 12 of the Act of 1920. In *Property Holding Co.* v. *Clark* (1) this court upheld the contention that the word "rent" in s. 12 meant the total payment under the instrument of letting, but in order to ascertain the rent the court can only look at the instrument of letting, and cannot look outside that document: *Ellen* v. *Goldstein* (2); *White* v. *Richmond Court, Ld.* (3). In the latter case payments reserved in a supplemental agreement executed after the execution of the lease were held not to constitute part of the rent. That case shows that what fixes the standard rent is the document containing the letting. The trial judge considered himself bound by *Property Holding Co.* v. *Clark* (1), but it is submitted that it is clearly distinguishable from the present case. Both Scott L.J. and Evershed L.J. placed particular importance on the questions whether a right of re-entry was granted for failure to make the additional payments, and whether the additional payments were made in consideration of the grant of the lease. In the present case it is clear that the payments were not made in consideration of the grant, but in respect of something quite different. Payments reserved by an agreement collateral to the tenancy agreement are not part of the consideration for the demise of the land and cannot therefore form part of the rent, whether the collateral agreement is contained in the same document as the tenancy agreement or not. In the present case the second deed was collateral to the lease and was not part of the tenancy. The landlords having fixed the rent at 175*l.* in the lease for their own purposes cannot now seek the assistance of the court to establish that that was not the real consideration for the demise and that the rent was in fact 275*l.*

[*Wilkes* v. *Goodwin* (4) also referred to.]

Blundell for the plaintiffs. The argument for the defendant seems to involve this: that the only letting in which the court is interested is the initial grant and that any variation by subsequent document must be ignored. *White* v. *Richmond Court, Ld.* (3) has been relied on, but that was merely a decision on the question which arises if premises have not been let

(1) [1948] 1 K. B. 630.
(2) (1920) 123 L. T. 644.
(3) [1944] K. B. 576.
(4) [1923] 2 K. B. 86, 105.

previously to September 1, 1939, but are first let after that date. Presumably the court was satisfied as to the letting and was not concerned with what happened afterwards. Here the court is concerned with what was the rent at which premises were let on September 1, 1939, and starts with the undisputed fact that at that date, and for a number of years, 275*l*. per annum was paid by the tenant to the landlords. The onus is on the present tenant to show that the payment was not rent and it requires a very clear case to discharge that onus. The supplemental agreement cannot be construed except in conjunction with the lease, and it clearly shows that the payment to be made by the lessee is part of his payment under the lease and as part of the terms on which the lease is held. Whether they were intended to be construed as one document or as separate documents, it is clear from their terms that the lessee, from the execution of the supplemental agreement, held under a larger contract and had to pay additional sums which were directly related to the demised premises. The judges in *Property Holding Co.* v. *Clark* (1) emphasized the importance of looking at the substance of the matter, and in the present case the landlords provided that the lessee should pay 275*l*. per annum for enjoyment of the flat and of all that the landlords had provided with the flat. The mere fact that a proviso for re-entry is absent from the second deed is not conclusive, and Scott and Evershed L.JJ. (1) did not intend so to hold.

TUCKER L.J. The question for determination is whether for the purposes of s. 12 of the Act of 1920, as amended, the rent at which the dwelling-house was let on September 1, 1939, is the aggregate of the sums provided for by the two agreements, or whether it is confined to the sum of 175*l*., described as the rent in the first document, namely, the lease. It is to be observed—and, in my view, this is the strongest point in favour of the defendant's contention—that the proviso for re-entry in the event of non-payment does not extend to the sum of 100*l*. per annum, payable under the supplemental agreement. That is a matter which it is no doubt right and proper to take into consideration in deciding whether the rent includes this extra 100*l*. or not.

The case which principally has been relied on and referred to by both sides is the case of *Property Holding Co.* v. *Clark* (1), recently decided in this court. The effect of that case was, in

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(1) [1948] 1 K. B. 630.

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substance, to approve the dictum of Younger L.J. in *Wilkes* v. *Goodwin* (1), where he had, in dealing with this question, used this language: " The first of these [considerations] is that the " word ' rent ' in this exception surely means not rent in the " strict sense but the total payment under the instrument of " letting. The exception assumes that ' rent ' so called may " include, for example, ' board,' payment of which is not rent. " I am here paraphrasing the statement of Shearman J. in " *Nye* v. *Davis* (2), with which I agree. And the second " consideration is that the exception contemplates separate " ' payments ' for any of the three things it specifies—namely, " board, attendance, use of furniture, the plural ' payments ' " being in striking contrast with the singular ' payment ' in " s. 9, where only one of these three things, namely, use of " furniture, is being dealt with. In my judgment so far from " the exception contemplating primarily a tenancy in which " rent strictly so called is with these other payments or one of " them lumped together under one composite payment designated rent, the contrary is the case. Such a composite " payment may indeed be within the exception; but separate " payments are within its more immediate contemplation." The gist of the dictum is contained in the opening sentence, that the word " rent " surely means not rent in the strict sense but the total payment under the instrument of letting. Evershed L.J. in his judgment in *Property Holding Co.* v. *Clark* (3), although in substance accepting and adopting what Younger L.J. had said—which had also been accepted by Asquith L.J.—did observe that the language might require some slight modification, because he said: " It is possible that the " paraphrase suggested by Younger L.J. ' the total payment " ' under the instrument of letting,' may be somewhat too widely " stated; for there may, in a contract of tenancy, be included " separate and collateral bargains, the payments to be made in " respect of such bargains being in substance and reality distinct " from the ' rent ' as I have defined it. Thus, a contract for " the tenancy of a dwelling-house might include a term that, " on paying the sum of, say, 10s. a week, the tenant might, " during the tenancy, or for some different period, have the " privilege of garaging his car in the landlord's garage, no part " of which was included in the demise." With that modification, the language of Younger L.J. was accepted, I think, by all the members of the court. In *Property Holding Co.* v. *Clark* (1), the court was dealing only with one document. The rights of the parties, whatever they might be, were to be found in one agreement. The language used by the Lords Justices must be read in those circumstances. The judgments all emphasize the necessity of arriving at the substance and reality of the matter as distinct from the formal and precise language used. Scott L.J. said: "it is the substance that "matters, and I am satisfied that in this case the 30*l.* a year "was, within the meaning of the Rent Restriction Acts, a "part of the rent." Evershed L.J. said: "Looking, therefore, "at the substance of the matter, I conclude that the 'rent' "within the meaning of the Act under the lease of 1934 was "140*l.* per annum and not 110*l.* per annum." In a later passage he emphasizes the necessity of looking at the substance of the matter.

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(1) [1923] 2 K. B. 105.

(2) [1922] 2 K. B. 56.

(3) [1948] 1 K. B. 630.

I think, therefore, that in order to ascertain whether the rent is 175*l.* or 275*l.*, and in order to ascertain the reality and substance of this transaction, we must look at both documents and see what results from the two together. Mr. Hoare argues that in the judgment of Evershed L.J. a test is laid down as to what constitutes "rent" for this purpose, and he says the facts of the present case do not come within either suggested definition. What Evershed L.J. said (2) is this: "In my "judgment the question in each case is to determine what in "substance is the subject-matter of tenancy granted to the "tenant by the contract: prima facie the rent is the monetary "compensation payable by the tenant in consideration for the "grant, however it be described or allocated. Alternatively, "it may be described (as Scott L.J. has described it) as the "contractual monetary obligation the payment of which is the "condition of the right to enjoy the property granted." Taking the first limb, "the rent is the monetary compensation payable "by the tenant in consideration for the grant, however it be "described or allocated," Mr. Hoare says that the 100*l.* is not monetary compensation payable for the grant because the grant had been already made by the lease and there was nothing more to grant. I would emphasize, as I have already stated, that Evershed L.J. was not dealing with two documents; he was dealing with a case where there was only one document. But I think his language or, broadly speaking, the way in which he approached the question, is applicable to the present case.

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(1) [1948] 1 K. B. 630, 640, 649. (2) Ibid. 648.

I think that the 100*l*. was part of the monetary compensation payable by the tenant in consideration for that which had been granted to him by the landlord under these two documents taken together.

Then, under the second limb, it is said that it does not come under the definition which was suggested by Scott L.J.: "the contractual monetary obligation the payment of which "is a condition of the right to enjoy the property granted." In that particular case, there being a proviso for re-entry in the case of non-payment both of the rent and of the sum which was called the additional payment, it is quite true that the payment of both sums was a condition of the right to continue to enjoy the property, because on non-payment of either of them the landlord could forfeit. I think that is why the word "condition" appears in this particular case, but I can find nothing in the judgments as a whole to indicate that the view of the court would have been otherwise if there had in fact not been a proviso for re-entry. It is quite true that Scott L.J. emphasizes the existence of this condition, and says that he regards it as conclusive, but none the less one frequently gets a lease where a payment is payable which nobody could describe as anything other than rent, but none the less where there is no proviso for any re-entry on non-payment. In those circumstances, it is not accurate to say that the payment of the rent is a condition of the continued enjoyment of the property; but none the less it is rent, and, in my view, this extra payment of 100*l*., being payment expressly made in consideration of decorative and other alterations to the premises, and as a contribution towards the management of the building, was a payment made in respect of the management of the demised premises. It was part of the contractual monetary obligation payable under these two agreements taken together, and relating to the premises demised. It therefore appears to me that unless there is some authority which forces me to a contrary view, the common-sense view of this matter is that the rent payable on September 1, 1939, in respect of these premises was 275*l*. and not 175*l*., and that that is the standard rent of these premises.

I should have mentioned that by September 1, 1939, Mr. Denham, the tenant, was no longer holding under these agreements, because in the year 1937 a letter had been written by the plaintiffs on May 18, in reply to some other letter which was not produced: "We are in receipt of your letter of "the 17th inst., and note that you desire to remain in the above "flat on a yearly tenancy as and from the 24th day of June "next on the same terms and conditions as your present "tenancy. To this we are agreeable and we are informing "our Accounts Department accordingly." Slade J. took the view that the result of that letter was that the original lease had been surrendered and that, therefore, Mr. Denham continued as a yearly tenant on the same terms as before. No evidence was given at the trial, the case was decided on the agreed documents, and to my mind it is immaterial whether the result of that letter was that there was a surrender of the lease or whether, as Mr. Blundell suggests as a possibility, the tenant had sought to terminate his lease under the clause giving him power so to do, but that he had given insufficient notice and that the effect of this letter was an intimation by the owners that they were prepared to accept the notice which he had given to terminate his lease on June 24 next, and thereafter to accept him as a yearly tenant on the same terms. It is, to my mind, immaterial which is the correct view. It is common ground that Mr. Denham at the material date was in fact holding as a yearly tenant and it is common ground that he was holding on the terms of the tenancy existing, whatever that may have been, on May 18, 1937. I think the terms of that tenancy should be ascertained by reference to the two documents to which I have referred.

It only remains for me to say that I agree with the view expressed by Slade J., that no assistance is to be derived for present purposes from *White* v. *Richmond Court, Ld.* (1), because that was a case dealing with the second limb of the definition of standard rent in the case of houses which were not let on a certain date and where the standard rent had to be ascertained upon the basis of the rent at which the premises were first let after the named date. In *White* v. *Richmond Court, Ld.* (1) the question was at what rent was the dwelling-house first let within the meaning of s. 12 (1.) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. There the court held that a lease, and a complete lease, having been entered into on March 24, 1941, fixing the rent, that was the document which constituted the first letting, and the fact that a few hours or a few moments later a separate agreement was entered into, varying the first, could not alter the fact that the first agreement was the one which constituted the first letting. It seems to me that the case of *White* v. *Richmond Court, Ld.* (1) is distinguishable from the present case and

(1) [1944] K. B. 576.

affords no assistance in the determination of the present question. I find myself in complete agreement with the conclusions arrived at by Slade J., and I think the appeal fails.

DENNING L.J. I agree. It seems to me that the cases relating to the standard rent of flats fall into two groups. First, where a flat was let before September 1, 1939, the courts have determined the standard rent by reference to the total amount payable at September 1, 1939, for the physical hereditament and the services that go with it, such as central heating, hot water, lift, and so forth ; and including also board, attendance and use of furniture, where those are not of sufficient value to take the case out of the Act. It is common knowledge that the landlords of flats often divide the total payment into two parts, one part to represent the value of the physical hereditament, the other part to represent the value of the services. The reason is because for rating purposes the value of the flat is fixed without taking the services into account. See *Bell Property Trust, Ld.* v. *Assessment Committee for the Borough of Hampstead* (1). As Goddard L.J. pointed out in that case this division of the total payment is sometimes made in one document, namely, the lease itself (as in *Property Holding Co.* v. *Clark* (2) ; and sometimes in two documents, as in this case. But howsoever the total payment is split up in the documents, the court will ascertain the standard rent by taking the total amount payable for the physical hereditament, and the services that go with it.

Secondly, when a flat is let after September 1, 1939, the standard rent is the rent at which it was first let, ascertained again by reference to the total amount payable. But the courts have had regard to the conditions produced by the war. At the end of 1940 and the beginning of 1941 everyone who could do so left London. The rents obtainable for flats were much below the 1939 figure. In that situation some landlords, who did not wish to be saddled permanently with a low standard rent, adopted the advice of letting the flat on a lease which on its face stated as the rent the figure which was intended to apply in the post-war period ; but containing provisions by which the landlord agreed for the time being to accept a lower rent. This device was sometimes made in one document, namely, the lease itself, as in *Bryanston Property*

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(1) [1940] 2 K. B. 543.

(2) [1948] 1 K. B. 630.

Co., Ld. v. *Edwards* (1) and *Tedman* v. *Whicker* (2), and sometimes in two documents as in *White* v. *Richmond Court, Ld.* (3). But, howsoever it was done, the court determined the standard rent, not by reference to the sum in fact first paid, but by reference to the higher figure stated in the lease, provided it was a real figure. This device was, however, obviously open to abuse, because the parties might insert in the lease a fictitious figure simply for the purpose of establishing the standard rent at a figure which was higher than was fair or reasonable, as in the *Conqueror Property Trust, Ld.* v. *Barnes Corporation* (4). The device has therefore, so far as I know, never been held to be good, except in the very special class of case where war-time conditions prevented the flat being let at a fair rent: and even in these cases, if the figure stated in the lease is not a reality, the court will reject it and have regard to the rent in fact paid.

These two groups of cases show that the courts endeavour as far as possible to ascertain the standard rent on a realistic and fair basis. The present case falls clearly within the first group. The amount payable in 1939 for the physical hereditament, and for the services, was 275*l*. The present tenant has the same benefit and should pay the same sum. I agree that the appeal should be dismissed.

ROXBURGH J. I agree.

Appeal dismissed.

Solicitors for defendant: *Bernard Shaffer.*
Solicitor for plaintiffs: *Clifford-Turner & Co.*

(1) [1944] K. B. 32.
(2) [1944] K. B. 112.
(3) [1944] K. B. 576.
(4) [1944] K. B. 96.

A. W. G.

Applied. R. *v.* MATTHEWS. [1950] 1 All E.R. 137.

RUSE *v.* READ

1949
Jan. 18, 26.

Lord Goddard C.J., Humphreys and Finnemore JJ.

Criminal law—Article wrongfully, but not feloniously, taken from owner's possession—Subsequent decision permanently to deprive owner of property in article—Animus furandi—Larceny.

Where a person has wrongfully, though not feloniously, taken possession of property belonging to another and at a later time determines to deprive the owner permanently of his property, he is guilty of larceny.

Reg. v. *Riley* (1853) 1 Dear. C. C. followed.

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Ruse
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Case stated by justices.

An information was preferred by the appellant, W. E. Ruse, a police sergeant, against the respondent Ivan Stewart Read charging him with feloniously stealing a pedal bicycle with a pump and dynamo lighting set, the property of one R. A. M. Purchase, contrary to s. 2 of the Larceny Act, 1916. The respondent elected to be dealt with summarily and, on the hearing of the information, the following facts were proved or admitted. The respondent was aged nineteen and was an electrical artificer in the Fleet Air Arm stationed at H.M.S. " Ariel," West Warrington, Lancashire. On June 30, 1948 he was on leave and was living at his home at Sidmouth, Devon. On the day in question an amusement fair was taking place at Yard Mead Meadow, Sidbury, near Sidmouth. At about 9.30 p.m. the owner of the bicycle, R. A. M. Purchase, rode it to Yard Mead Meadow and left it against the wall at the entrance to the fair and went into the fairground. At about 9.45 p.m. he returned to the place at which he had left his bicycle and found that it was missing. On the same evening the respondent, who had visited at least five public houses in which he had drunk a quantity of rough cider and beer, walked to the fairground and visited the various side-shows. On leaving, he noticed the bicycle leaning against the wall and being attracted by its bright red colour, he took it and rode about the neighbourhood on it for about two hours. He had by then " sobered up " and, not knowing what to do with the bicycle he went home and put it in the lane behind his mother's house, in which he was then living, and went to bed. On the following morning at about 9 a.m. the respondent was, as he said in his evidence, in a " panicky " condition, and wondered what to do with the bicycle. He removed the dynamo and pump, sending the former by registered post addressed to himself at H.M.S. "Ariel," West Warrington, and leaving the pump in the house. At 10.45 a.m., at Sidmouth railway station he consigned the bicycle by rail for the sum of 12*s.* 2*d.* to York, labelled " Mr. Read, York " Railway Station, To be collected." On the same day, a school boy returning home from school, saw the bicycle at Sidmouth station and recognized it as belonging to Purchase. He reported the matter to him and the police were informed. The respondent was interviewed by a police constable and gave the latter an accurate account of what had taken place. He further stated that his purpose in sending the bicycle to

York was to get rid of it as he did not know what to do with it after sobering up. He thought that if he sent the bicycle away, as he was returning to his unit on July 7, no one would know anything about it. In his evidence before the justices the respondent said that at the time of taking the bicycle he did not, in consequence of his condition, realize the significance of having taken it; that his object in sending the bicycle to York was to get rid of it out of his possession; that he had no intention of collecting it at York, and that when he took the bicycle he was considerably under the influence of drink and described his condition as being drunk.

It was contended for the respondent that at the time of taking the bicycle he was under the influence of drink to such an extent as to be incapable of forming, and did not form, the intention of permanently depriving the owner of it.

The justices came to the conclusion that at the time of the taking, the respondent had no intention of permanently depriving the owner of the bicycle of his property and was incapable of forming such an intention and that, consequently, he was not guilty of the offence charged. They, therefore, dismissed the information. The prosecutor appealed.

Malcolm Wright for the appellant. The decision of the justices was wrong and their finding that on the facts of the case the respondent was incapable of forming an intention to steal the bicycle cannot be supported, since it is clear from his actions that he was not under the influence of drink to such an extent as to be incapable of forming an intention. A degree of drunkenness falling short of the inability to form an intention affords no defence to a criminal charge. Assuming, however, that the finding was right and at the time he was incapable of forming an intention to steal, as soon as he was capable of forming one, the facts all point to his having formed the intention of depriving the owner of his property in the bicycle, and that would be sufficient to support a conviction. (*Rex* v. *Hudson* (1)). But the present case is governed by the decision in *Reg.* v. *Riley* (2). It was there held that if a man rightly gets possession of an article without any intention at the time of stealing it, and afterwards misappropriates it, the law holds it is not a felony, but where the original possession is wrongful, though not felonious, and the man subsequently disposes of the chattel, animo furandi, it is larceny.

(1) [1943] K. B. 458.

(2) (1853) 1 Dear. C. C. 149.

[LORD GODDARD C.J. The present case is stronger than *Reg.* v. *Riley* (1) because here the respondent knew that he was wrongly taking the bicycle.]

In *Reg.* v. *Ashwell* (2) Lord Coleridge C.J. approved of the decision in *Reg.* v. *Riley* (1) and that appears to be the only reference to the case in the reports. In *Reg.* v. *Flowers* (3) it was held that the old rule of law that the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny was not affected by the decision in *Reg.* v. *Ashwell* (2). In the present case the taking of the bicycle was plainly wrongful since the respondent had no right at all to take it. He rode it for two hours, being in a condition to do so notwithstanding the amount of drink he had taken, and when he had become more sober he took no steps to restore the bicycle to its owner but consigned it to York and posted some of the accessories to himself. On the authority of *Reg.* v. *Riley* (1) there was here a trespass in taking the bicycle followed by an appropriation of it, and the justices should have convicted. (See also Prof. Kenny's Outlines of Criminal Law, 14th ed., p. 216; Pollock & Wright on Possession, Part 2, p. 114, Part 3, p. 142. *Director of Public Prosecutions* v. *Beard* (4)).

T. Dewar for the respondent. The finding by the justices that the respondent did not intend permanently to deprive the owner of the bicycle of his property is conclusive and was supported by the evidence. If that is so, it is not proper to rely on an alleged act of appropriation on the following day. The information charged larceny at the time and place of the original taking and if the prosecution desired to rely on a subsequent appropriation, the information should have been amended or the respondent should have been given proper notice. The moment of appropriation is the moment of the larceny (*Rex* v. *Hudson* (5)). Further, there was no express finding by the justices that the respondent at any time after the original taking ever intended permanently, to deprive the owner of his property which is essentially a question of fact for the justices (*Rex* v. *Philipps & Strong* (6). It is submitted that the decision in *Reg.* v. *Riley* (1) is not good law. Before that decision there is no case in which it was held that an original, but not felonious trespass, was turned into larceny by a subsequent appropriation. (See Hale's Pleas of the Crown, Vol. 1, p. 509, and East's Pleas of the Crown, Vol. 2, p. 661.) It is noticeable that in the definition of larceny in s. 1 of the Larceny Act, 1916, the words used are "with intent, at the time of such taking permanently to "deprive the owner thereof," clearly indicating that Parliament rejected the principle embodied in *Reg.* v. *Riley* (1).

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(1) 1 Dear. C. C. 149.

(2) (1885) 16 Q. B. D. 226.

(3) (1886) 16 Q. B. D. 643.

(4) [1920] A. C. 479.

(5) [1943] K. B. 458.

(6) (1801) 2 East's Pleas of the Crown, 662.

Malcolm Wright in reply.

Cur. adv. vult.

Jan. 26. HUMPHREYS J. read the judgment of the Court. The question which the court is asked to answer is whether on the facts as stated in the case the justices came to a correct decision in point of law, which we construe as meaning whether there was any evidence to support their finding.

This court is always loth to disturb a finding of fact by justices and, particularly, where the finding is in favour of an accused person, but the decision in this case, having regard to the evidence, does seem to us a startling one. It is to be observed that no attempt was made to show that the respondent formed any intention at the time of the taking, such as an intention to borrow the machine and then to return it to its owner. The argument accepted by the justices was that by reason of drunkenness he was incapable of forming any intention at all. The only evidence in support of that finding was (1.) that after leaving the public house he walked to the fairground and round the various side-shows ; (2.) that he was considerably under the influence of drink when he took the bicycle ; (3.) that he rode the bicycle, apparently without accident, for two hours, and (4.) that he rode it home and then secreted it in the lane behind his mother's house. The respondent himself in the witness box did not put his case higher than this : "That at the time of taking the bicycle in "consequence of his condition he did not realize the significance of having taken it," whatever that may mean. The decision of the House of Lords in *Director of Public Prosecutions* v. *Beard* (2) shows that on the question of intention, evidence of a state of drunkenness rendering the accused incapable of

(1) 1 Dear. C. C. 149.

(2) [1920] A. C. 479.

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forming the intent necessary to constitute the particular crime, should be taken into consideration together with the other facts of the case, not because drunkenness in itself is an excuse for the crime, but because the state of drunkenness may be incompatible with the actual crime charged and may, therefore, negative the commission of that crime. Can it be said that a man who is able to mount and ride a bicycle for two hours is yet so incapably drunk that he is unable to apply his mind to the simple question whether he intends to take the machine away for good or to borrow and return it? Had there been no other question to be considered, the court would have found it very difficult to uphold this decision, but Mr. Malcolm Wright has drawn our attention to another aspect of the case perhaps of more general importance. Whatever may have been the state of mind of the respondent on the night of June 30, it is clear beyond dispute that on the next morning, not only did he fail to take any steps to return the bicycle to the place from which he had taken it, or to inform the police or anyone else that he was in possession of the machine, but on the contrary he did everything in his power to prevent the discovery by the owner either of the machine or the accessories. Nothing could be more indicative of his then intention to deprive the owner permanently of his property. It is equally clear that on the previous evening in taking away the bicycle he had committed a trespass, since he had no permission from the owner. The question then arises—even if the taking on June 30, though unlawful, was not felonious because of the absence of the essential intention, did it become so when that intention was manifested on the following day? Mr. Malcolm Wright relied on the case of *Reg.* v. *Riley* (1). That was a case in which Riley had put into a field belonging to one Clark twenty-nine of his own lambs, there being already there ten lambs belonging to one Burnside. Early in the morning, Riley drove away his twenty-nine lambs and with them one lamb belonging to Burnside. He sold his lambs and, it being pointed out by the purchaser, that there were thirty lambs he completed the sale and received the price of the thirty lambs which he appropriated to his own use. He later denied having done so and told other untruths about the matter. He was indicted for stealing the lamb of Burnside and the jury returned a verdict as follows:—"At the time of

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(1) 1 Dear. C. C. 149.

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"leaving the field the prisoner did not know that the lamb "was in his flock but that he was guilty of felony at the time "it was pointed out to him." On a case reserved, the court for Crown Case Reserved unanimously held that the conviction was right. In the course of the argument Parke B., put the matter succinctly as follows :—"The taking being "a trespass : when there is the animus furandi it becomes "a felony." Without calling upon counsel for the Crown, Pollock C.B. delivered judgment distinguishing some earlier cases and continuing : "In the case before the court the "prisoner's possession of the lamb was from the beginning "wrongful, the taking of the lamb from the field was a trespass ". . . . if the original possession be rightful, subsequent mis-"appropriation does not make it a felony ; but if the original "possession be wrongful, though not felonious, and then a "man disposes of the chattel animo furandi, it is larceny." Parke B. in his judgment observed : "The original taking "was not lawful. The prisoner being originally a trespasser, "he continued a trespasser all along, ... and, being "a trespasser, the moment he took the lamb with a felonious "intent he became a thief. He at first simply commits "a trespass ; but as soon as he entertains a felonious intent "that becomes a felonious trespass." In the case put, where the original possession was rightful, regard must, of course, be had today to the provision now embodied in the Larceny Act, 1916, making larceny by a bailee punishable. Otherwise *Riley's* case stands.

It was not new law in 1853 :—Sir Matthew Hale in Vol. 1 of his History of the Pleas of the Crown at p. 509, writes : "If my servant, without my privity, takes my horse, and "rides abroad 10 or 12 miles upon his own occasions, and "returns again, it is no felony, but if in his journey he sells "my horse, as his own, this is a declarative of his first taking "to be felonious, and animo furandi."

Sir Matthew Hale would apparently have approved the decision in *Riley's* case. It is treated by Sir James Stephen in his Digest of the Criminal Law, 8th ed., p. 334, art. 370, as part of the law of England. In that authoritative work, "Possession in the Common Law" by Pollock and Wright, in Part 2, written by Sir Frederick Pollock at p. 114, the learned author writes "the judgment of Parke B. in *Riley's* case has "now been accepted as authoritative, though not always "without reluctance, for more than 30 years." While in Part 3, written by R. S. Wright, afterwards Wright J., at p. 142, the case is fully discussed as an important authority, apparently with approval.

Reg. v. *Ashwell* (1), where the fourteen judges were equally divided (though as afterwards appeared the difference of opinion was rather on the facts than on the law), was also referred to by Mr. Malcolm Wright. The facts in that case were that Ashwell asked Keogh for the loan of a shilling. Keogh gave him what he believed to be a shilling and Ashwell took it under the same belief. Some time afterwards Ashwell discovered that the coin was a sovereign. He then and there fraudulently appropriated it to his own use. Ashwell being convicted of larceny of the sovereign Denman J. reserved the question for the judges. The only one of the judges who referred to the case of *Reg.* v. *Riley* (2) was Lord Coleridge C.J., who observed that the conviction in that case was upheld on a ground extremely technical, but regarded it as "an authority under circumstances hardly different from "those in the present case for upholding the conviction."

The only other case to which our attention was drawn was the decision of this court in *Rex* v. *Hudson* (3). In that case the appellant had received by post an envelope intended for some other person. He kept it for some days and then on opening it he found inside a cheque drawn to J. Hudson but intended, as he knew, for some other person. He then fraudulently appropriated the cheque. Being convicted of larceny of the cheque he appealed to the Court of Criminal Appeal. The argument on his behalf was to the effect that as he had no animus furandi when he received the envelope containing the cheque he could not be convicted. The court upheld the conviction on the ground that the effective taking of the cheque by the appellant was when he opened the envelope and at once appropriated the contents since, as Charles J., said in the course of delivering the judgment of the court "at that moment for the first time he was in a position— "which he had not been before—to form an intent." We agree with that decision.

Being of opinion that the decision in *Reg.* v. *Riley* (2) is still good law and binding on this court, our judgment is that the justices misdirected themselves and should have found the offence proved. The case must go back to them with that expression of opinion.

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(1) 16 Q. B. D. 190.
(2) 1 Dear. C. C. 149.
(3) [1943] K. B. 458.

Appeal allowed

Solicitors for the appellant: *Crawley and de Reya, for J. C. M. Dyke, McLusky & Hughes, Exeter.*

Solicitors for the respondent: *Gibson & Weldon, for Chard and Coxwell, Sidmouth.*

P. B. D.

CARDIFF RATING AUTHORITY AND CARDIFF ASSESSMENT COMMITTEE *v.* GUEST KEEN BALDWIN'S IRON AND STEEL COMPANY LIMITED.

C. A.
1948
Nov. 24, 25;
Dec. 3, 13.

Bucknill and Denning L.JJ. and Jenkins J.

Rating—Steel-works—Land, buildings, plant and machinery—Valued as one hereditament on " the contractor's theory "—Certain short-lived plant with life of less than twenty years—Valued on a " unit " basis—Movable tilting furnaces and gas, cold blast and hot blast mains—Plant or machinery " in the nature of a building or structure " —Criterion of movability—Plant and Machinery (Valuation for Rating) Order, 1927 (*St. R. & O.* 1927, *No.* 480), *sch., class* 4.

At quarter sessions a recorder assessed the greater part of an iron and steel works for rating purposes on the principle of " the " contractor's theory " of valuation.

In the case of four blast furnaces, two fixed melting furnaces and sixty-nine coke ovens, however, the recorder departed from this theory and adopted a " unit valuation " on the ground that they were short-lived and had a normal life of less than twenty years.

Held that " the contractor's theory " was only one of the ways in which the tribunal of fact could form some idea of what a hypothetical tenant would pay. The tribunal could approach this task from several possible bases—different methods of arriving at the final figure of assessment. The court would not interfere with the assessment unless the method employed was demonstrably incorrect or the figure arrived at so demonstrably wrong that it must have been arrived at by an incorrect method. The reason given by the recorder might or might not be a good reason for employing " the " unit basis " for these furnaces and coke ovens. It was not necessary for him to give any reason. If for any reason he thought it better to take " the unit basis " for these items, he was entitled to do so.

At certain iron and steel works, tilting furnaces with a capacity of 200 to 250 tons of steel rested by their own weight on steel rollers, meeting on curved roller paths, which were themselves supported on concrete piers. It was possible by the use of certain appliances

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CARDIFF RATING AUTHORITY AND CARDIFF ASSESSMENT COMMITTEE *v.* GUEST KEEN BALDWIN'S IRON AND STEEL CO., LD.

to lift each furnace off its supporting piers. At the works were also a 13,000 ft. run of overhead gas mains, cold blast and hot blast mains, made up of 20 ft. long lengths, bolted together and resting on but not attached to, steel vertical supports on metal bridge structures at a height of from 10 to 35 feet above ground.

Held that, notwithstanding their movability, both the tilting furnaces and the mains were "in the nature of a structure" within the opening words of class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, made under s. 24, sub-s. 5, of the Rating and Valuation Act, 1925 and therefore rateable.

Observations on the meaning of the words "building or "structure."

Judgment of the Divisional Court [1948] W. N. 167 approved, except that in the case of the tilting furnaces which the recorder had held not to be rateable, they had adopted "the contractor's "theory" of valuation in their assessment, whereas it was plain from his assessment of the fixed furnaces (which the Divisional Court supported), that the recorder would have used "the unit "basis."

CROSS-APPEALS from a decision of the Divisional Court (1) on a case stated by the former recorder of Cardiff.

The Cardiff assessment committee determined a proposal of the rating authority for the city and county of Cardiff to increase the assessment of the Dowlais Works at East Moors, Cardiff, occupied by Guest Keen Baldwin's Iron and Steel Co., Ld., to 80,327*l.* n.a.v. and 20,082*l.* r.v. by confirming the proposal. The occupiers appealed and the recorder, having visited and inspected the works substituted an assessment of 58,000*l.* n.a.v. and 14,000*l.* r.v. The rating authority and the assessment committee appealed by way of case stated, and, by consent of the parties, parts of the recorder's judgment were read to the court.

The rating authority and the assessment committee contended that the recorder was wrong (1.) in reducing the assessment by 6,090*l.* n.a.v. in respect of (*a*) four blast furnaces, (*b*) two fixed steel melting furnaces and (*c*) sixty-nine coke ovens; (2.) in holding that five tilting furnaces were not rateable; and (3.) in holding that certain gas mains and hot and cold blast mains were not rateable. As to their first contention, their witness, Mr. Gerald Eve, arrived at his figure of 80,327*l.* n.a.v. by valuing the works as one entire hereditament taking the effective capital values of the land, buildings, plant and machinery, and applying certain percentages thereto.

(1) [1948] W. N. 167.

The recorder accepted the capital values of this valuation as being the true effective capital values of the land, buildings, plant and machinery, and he also accepted the percentages applied by the witness to these capital values, to arrive at the net annual value of the hereditament, i.e., the recorder accepted the principle of "the contractor's theory" of valuation, but he did not adhere to this theory when determining the value of the (*a*) four blast furnaces, (*b*) two fixed steel melting furnaces and (*c*) sixty-nine coke ovens, because they were "short-"lived." It would, he said, be "forced and anomalous" from a tenant's point of view to base the rent of these on the capital value. He stated that all rateable plant and machinery which had a normal life of at least twenty years should be valued on "the contractor's theory," but that such parts as the blast furnaces, melting furnaces and coke ovens as had a shorter normal life than twenty years should not be valued on that basis, but on a "unit valuation." He then fixed the units of valuation, by taking each of the said blast furnaces, melting furnaces and coke ovens as a separate unit and assessing a net annual value in respect of each unit. If he were wrong in this matter, the net annual value of 58,000*l.* fixed by him, would be increased by 6,090*l.*

The rating authority and the assessment committee contended that the rateable value of the works had to be ascertained in accordance with s. 25, sub-s. 1 (*b*), of the Rating and Valuation Act, 1925; they relied on *Consett Overseers* v. *Durham County Council* (1), as showing that the works ought to have been valued as one entire hereditament; and said that the recorder had treated a particular part of the plant as a separate rateable hereditament and that this was an error in law. They also contended that Mr. Eve's valuation must be deemed to have taken into account the fact that some of the furnaces were short-lived, a fact which would be taken twice into account by the further reduction resulting from the method adopted by the recorder.

As to the second contention of the authority and the committee, each of the five tilting furnaces resembled a large bath in which metal was melted and which could be and was tilted by means of an electric motor to pour molten metal and slag from it into other receptacles. Each was made of steel plates and joists, bolted, riveted and welded together on the site and was lined internally with special brick lining of considerable thickness. The approximate length of each was 30 ft.; width, 18 ft.; superficial area (of molten metal when full), 685 to 715 sq. ft.; weight, over 300 tons; capacity, 200 to 250 tons of steel. Each tilting furnace rested by its own weight on steel rollers, resting on curved roller paths, which were themselves supported on concrete piers. To remove the rollers and roller paths, when necessary, it was possible, by the use of suitable appliances to lift each tilting furnace off its supporting piers. The recorder said: "The furnaces "are, therefore, movable and are in fact being moved "continually while in use. In my view they are not rateable."

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(1) (1922) 20 L. G. R. 809.

As to the third contention of the authority and the committee, upon the hereditament was 13,000 ft. run of overhead gas mains, cold blast mains and hot blast mains made up of 20 ft. lengths, bolted together on the site and carried from one point to another throughout the steel works, and resting on, but not attached to, steel vertical supports or metal bridge structures at a height of from 10 ft. to 35 ft. above ground. The external diameter of the mains varied from 20 to 96 ins. The hot blast mains were lined with brickwork, to conserve the heat, and outside the brickwork was the outer casing of steel. The recorder held that the mains, apart from the supporting structures were not rateable on the ground that being removable, they were not part of the hereditament. The Divisional Court, after reading the recorder's judgment were of opinion that he had held that the mains and the tilting furnaces being movable and the tilting furnaces being moved when in use could not be "buildings or structures" or "in the nature of buildings or structures" within the meaning of the opening words of class 4 in the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927.] The recorder said that if he were wrong in holding that the tilting furnaces and the mains were not rateable, the net annual value of 58,000*l.*, fixed by him, would be increased by 1,234*l.* in respect of the mains and 2,437*l.* or 5,937*l.*, in respect of the tilting furnaces, according to whether a "unit basis" or the "contractor's theory" was the proper method of valuation to be adopted.

In the case of both tilting furnaces and the mains counsel for the occupiers admitted that the sole question was whether it could be said of the plant and machinery that it, "is, or is in "the nature of, a building or structure" within the meaning of the opening words of "class 4" of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, made under s. 24, sub-s. 5, of the Rating and Valuation Act, 1925.

The Divisional Court (Lord Goddard C.J., Humphreys and Pritchard JJ.) upheld the decision of the recorder on the first issue as to the four blast furnaces, the two fixed steel melting furnaces and the sixty-nine coke ovens; but on the second and third issues as to the five tilting furnaces, the gas mains and hot and cold blast mains, they allowed the appeal, holding that the recorder was wrong in interpreting the opening words of class 4 in the schedule as adopting the criterion of movability. These items were in the nature of a building or structure, but they assessed the tilting furnaces on the contractor's theory, increasing the assessment by 5,937*l*. See [1948] W. N. 167.

The occupiers appealed. The rating authority and the assessment committee cross-appealed.

Comyns Carr K.C. and *R. Gwyn Rees* for the occupiers. The occupiers seek to restore the recorder's judgment as it stood. On the first question as to the assessment of certain furnaces and coke ovens with a life respectively of five and fifteen years, on the unit basis, the decision of the Divisional Court, upholding that of the recorder, on the question of fact, was right: that is the subject of the cross-appeal.

On the second and third questions, the decision of the Divisional Court was wrong in disturbing the decision of the recorder that these tilting furnaces and mains were not rateable. The issue for him was a simple issue of fact. See the judgment of Lord Halsbury L.C. in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (1). The views of Lord Esher M.R. in *Tyne Boiler Works Co.* v. *Overseers of Longbenton* (2) and the earlier decisions therein mentioned were overruled by s. 24 of the Rating and Valuation Act, 1925, which dealt with the valuation of hereditaments containing machinery and plant. The Plant and Machinery (Valuation for Rating) Order, 1927, made under sub-s. 5 of s. 24 has effect as if substituted for the third schedule to the Act of 1925. The court is concerned with the opening words of class 4 in the schedule to the order: "The following parts "of a plant or a combination of plant and machinery whenever "and only to such extent as any such part is, or is in the nature "of, a building or structure." Then follows a list of such plant and machinery which includes "furnaces," "flues," "flumes

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(1) [1901] A. C. 175, 179–80. (2) (1886) 18 Q. B. D. 81, 89–90.

"and conduits." There were, therefore, two questions for the recorder: were these tilting furnaces, gas mains and hot and cold blast mains included in the list under class 4, and, if so, were they either buildings or structures or in the nature of buildings or structures. It is plain from the phraseology used in the schedule that heavy plant is not necessarily in the nature of a building or structure. The recorder considered this question of fact and has decided it and the court will not interfere with his decision. There is one reported decision on the meaning of these words in the schedule, that of Atkinson J. in *South Wales Aluminium Co., Ld.* v. *Neath Assessment Committee* (1) who held that certain electrolytic cells composed of plates and fittings assembled together being substantial rectangular receptacles measuring 16 by 11 feet, to which direct current was passed, were not in the nature of buildings or structures. Apart from the meaning of the word "structure" Atkinson J. treated the question as one of fact. And he construed the word "structure" as meaning something which is constructed in the way of being built up, as is a building. "It is," he said, "in the nature of a building." That this issue whether something is a building or structure is one of fact for the tribunal of fact appears from cases decided under the Building Acts for London: *London County Council* v. *Pearce* (2); *Lavy and Another* v. *London County Council* (3) and *London County Council* v. *Illuminated Advertisement Co.* (4). The recorder regarded the question of the movability of these tilting furnaces and mains as only one of the tests whether they were buildings or structures or in the nature of buildings or structures. There were many factors to be taken into consideration and movability was one of these.

If the Divisional Court is right that these tilting furnaces are rateable, it is plain that their assessment is wrong, since they have assessed them on the contractor's theory by increasing the assessment by 5,937*l*. But by the earlier part of their judgment they upheld the employment by the recorder of the unit basis for the assessment of short-lived furnaces. The assessment, therefore, for these furnaces should have been increased by only 2,437*l*.

On the question of the assessment of certain electrical plant by the recorder, there being a decision against the occupiers, I do not desire to argue the question here; but ask that the

(1) [1943] 2 All E. R. 587.
(2) [1892] 2 Q. B. 109.
(3) [1895] 1 Q. B. 915.
(4) [1904] 2 K. B. 886.

point may be left open, should the occupiers, on other grounds, desire to appeal to the House of Lords.

Michael Rowe K.C. and *H. H. Roskin* for the rating authority. In considering the question whether these tilting furnaces and mains were buildings or structures or in the nature of buildings or structures, the recorder appears to have used as a sole test that of movability. They were movable and so, he thought, not rateable. This was put forward not only as the dominant but the sole criterion of his judgment. The Divisional Court have ruled that he was wrong that this is the law both as regards the law before and after the passing of the Rating and Valuation Act, 1925. The recorder never applied his mind to the question whether, if the tilting furnaces and mains were movable, they still were in the nature of buildings or structures. It is clear that they are in the nature of structures.

There remains the question of the cross-appeal by the rating authority and the assessment committee. The Divisional Court have held that the recorder was entitled in the case of the four blast furnaces, the two fixed steel melting furnaces with a life of five years and in the case of the sixty-nine coke ovens with a life of fifteen years to assess them on "the unit basis," although the iron and steelworks as a whole have been assessed by him on the contractor's theory and this solely on the ground of the short life of these furnaces and mains. The Divisional Court held that the question was one of fact for the recorder, but my submission is that he erred in law. There is no reason why plant and machinery with a short life cannot be adequately assessed on the contractor's theory. As Lord Halsbury said in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (1): "Surely those who are complaining "of what has been done by the tribunal must establish "either that something has been excluded from the calcu-"lation which by law ought to be included, or that "something has been included which by law ought not to have "been included." The fact that these furnaces and coke ovens would have a short life could have been allowed for on the contractor's theory and, no doubt, were allowed for in the evidence on that basis put before the recorder. Accordingly their short life was quite irrelevant and there was no reason for their assessment on the unit basis which, therefore, was an error in law.

In applying the contractor's theory the tribunal assume that

(1) [1901] A. C. 175, 183.

a hypothetical tenant would pay a rent equal to reasonable interest on the effective capital value. The hypothetical landlord who built a furnace and agreed to repair it would expect a rent equal not only to the interest on his capital outlay but also an amount sufficient to create a sinking fund to replace the furnace after five and the coke ovens after fifteen years. If the hypothetical tenant were bound to repair a furnace, the rent would merely be the interest on the capital outlay and the expense of providing the sinking fund would be on the tenant. No doubt, effective capital value at the time of assessment and not capital outlay is the proper figure to be considered. The contractor's theory is adequate for assessing the plant, whether its life be long or short and there is no reason for applying the unit basis in the case of plant with short life. The error in law is the assumption by the recorder that there was such a reason. No doubt there would be uncertain factors as to the amount which a hypothetical tenant could earn, but the reduction in assessment was made on account of the short-life of these specified items of plant—which could be and, no doubt, had been adequately accounted for by the method of the contractor's theory. There was an error in law in that on the facts found the recorder was not justified in departing from the contractor's theory. The contractor's theory takes into account the whole efficiency value.

H. H. Roskin for the assessment committee.

Comyns Carr K.C. on the cross-appeal. The question was one of fact for the recorder. It does not appear that in this case in applying the contractor's theory Mr. Eve and the recorder had made allowance, by accounting for a sinking fund, for the short life of these items of plant. If that was taken into consideration, so also the assessment by the unit basis took that into consideration—must necessarily do so. The recorder was entitled to apply both the methods in the way he did. The furnaces and coke ovens do not depreciate, during their short life, at a uniform rate. The unit basis gives an assessment nearest to market value, where there is no market (*Consett Overseers* v. *Durham County Council* (1) was cited).

In reply, on the occupier's appeal: There is nothing to show that the recorder misinterpreted the words: "building or "structure" in the opening words in class 4 in the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927.

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(1) 20 L. G. R. 809.

South Wales Aluminium Co., Ld. v. *Neath Assessment Committee* (1) is conclusive in my favour.

Michael Rowe K.C. replied on the cross-appeal.

Cur. adv. vult.

Dec. 3. BUCKNILL L.J. I will ask Denning L.J. to give the first judgment in this case.

DENNING L.J. The learned recorder adopted the contractor's basis for the steel works as a whole, but reduced the figure by reason of the short life of the furnaces and coke-ovens. It is said that he made an error of law in so doing. I have had occasion in the case of *The British Launderers Research Association* v. *The Rating Authority for the Borough of Hendon* (2) to distinguish between a question of fact and a question of law, and I need not repeat what I there said. Applied to cases such as the present, I have no doubt that the "net annual value" of a hereditament is a conclusion of fact. The proper figure can be as well ascertained by a layman, properly directed on the law, as by a lawyer. It is the rent which a hypotheticl tenant from year to year might reasonably be expected to pay. Once the net annual value has been found by the tribunal of fact, the only questions of law which can arise are whether the tribunal of fact properly directed itself, and whether that conclusion was one to which it could reasonably come. If it came to its conclusion of fact by a process of reasoning which was demonstrably incorrect, as, for instance, if it had regard to a consideration which was entirely irrelevant, that would be an error in point of law. That is what Mr. Rowe says has happened here. He says that the contractor's basis should be taken without any deduction for the short life of the furnaces and coke-ovens.

In applying the contractor's basis, the tribunal of fact assumes that a hypothetical tenant would pay a rent equal to reasonable interest on the effective capital value. Mr. Rowe says that a hypothetical landlord who built a furnace and agreed to repairs it would reasonably expect a rent equal to the interest on the capital outlay, together with an amount sufficient to create a sinking fund to meet the cost of rebuilding after five years. If the landlord was not bound to repair, but the hypothetical tenant was, the rent would be the interest on the capital outlay, leaving the tenant to provide his own sinking fund. Mr. Rowe, however, admitted that that test would not be exhaustive. A hypothetical tenant would have regard to the amount he could earn by the use of the furnace. That might depend on uncertain factors, such as the state of the market, or black-out conditions in war-time. Mr. Rowe says that, if the assessment had been reduced for such reasons as those, he could not have complained, but that it was reduced because of the short life, which was a wrong reason. Mr. Rowe also admitted that the initial capital outlay would not be the right figure to work on; it should be the effective capital value at the time of assessment, which might be a very different figure. But he said that the effective capital value would take into account the short life of the furnace, and that, therefore, once the effective capital value was ascertained, as it was here, no further deduction should be taken on account of the short life.

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(1) [1943] 2 All E. R. 587.

(2) Post pp. 471, 472.

If the contractor's basis was a test prescribed by law, I think that Mr. Rowe's argument would be correct; but it is nothing of the kind. It is only one of the ways in which the tribunal of fact can form some idea of what a hypothetical tenant would pay. No one ever lets or rents a steel works. Even when the contractor's basis is taken, the assessment on that basis is open to great variations up and down, as, for instance, in assessing the effective capital value and in deciding what percentage to take on it. Take a furnace. The effective capital value at the beginning of its life of five years would be very different from that at the end of it. What is the figure to be taken? The possible variations may become so great that the contractor's basis ceases to be a significant factor in the assessment.

In such a situation the tribunal of fact may prefer to take some other basis, such as that of the "unit basis." That is a basis which is often applied when there is a composite plant consisting of a number of units, such as a battery of furnaces. Any one unit will obviously have a different value from any other, according to its age. As one becomes useless, a new one takes its place, and so on. In the case of such a battery, a convenient method is to assess it at so much a unit and multiply by the number of units. In applying the unit basis the tribunal has before it the evidence of experts, giving their opinion of the value based on their experience and on comparison with the assessments made on similar hereditaments in other parts of the country: as, for instance, the assessment on a battery of furnaces in Durham taken at so much per unit, that is, per furnace. Then, using those figures as a guide and making allowance for individual factors, the tribunal makes its own assessment. No one can say that that is not a proper basis of assessment, especially as it helps to secure uniformity of treatment over the industry.

The truth is that in these cases the tribunal of fact can approach their task from several possible bases. The basis which they take for one part of the hereditament may be different from that for another. They may work out figures on two different bases and arrive at an assessment in between the two. The selection of the basis or bases and the application of them, singly or in combination, are only methods of arriving at the final figure of assessment. The parties can urge before quarter sessions all their arguments on this basis or that: but once quarter sessions have fixed the figure that, as a rule, is final. An appellate court will not interfere unless the method is demonstrably incorrect, or the figure is so obviously wrong that it must have been reached by an incorrect method: see *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (1).

In this case I do not think that the learned recorder was demonstrably incorrect. He took the contractor's basis for part of the works and the unit basis for the furnaces and coke-ovens. He was entitled to do that. The reason which he gave for not applying the contractor's basis to the furnaces and coke ovens (the shortness of their life) may or may not be a good reason, but that does not matter. It was not necessary for him to give any reasons for rejecting the contractor's basis. If, for any reason, he thought that it was better to take the unit basis, he was entitled to take it. The argument of Mr. Rowe comes to this, that, because there was no good reason for departing from the contractor's basis, therefore the learned recorder should have adopted it. If we were to accede to that view, it would mean that as a matter of law the learned recorder ought to adopt the contractor's basis: but that is not the law.

The learned recorder held that the tilting furnaces and the mains were not rateable at all. They are, of course, parts of the plant, and are only rateable if they come within the categories specified in class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927. The tilting furnaces come within "furnaces" and the mains come within "flues" and "flumes and conduits"; but, nevertheless, in order to be

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(1) [1901] A. C. 175, 180.

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rateable each must be "a building or structure" or "in "the nature of a building or structure." The learned recorder has held that they are not structures, or in the nature of structures, and Mr. Comyns Carr says that his finding is a finding of fact with which an appellate court should not interfere. That is, however, an over-simplification. The primary facts, that is, the real facts relating to the physical state of the tilting furnaces and mains, are not in dispute. The question is what is the proper conclusion from those primary facts. In so far as that involves the proper interpretation of the words of the order, it is a question of law. Once, however, those words have received a clear interpretation, which can be applied by laymen as well as by lawyers, then, so long as there is a proper direction as to their meaning, the conclusion of fact is one for a tribunal of fact, with which an appellate court will not interfere, unless the conclusion is one which could not reasonably be drawn from the primary facts.

In this case the learned recorder seems to have thought that these were not structures or in the nature of structures because they were movable. In my opinion, that was a misdirection. A structure is something which is constructed, but not everything which is constructed is a structure. A ship, for instance, is constructed, but it is not a structure. A *structure* is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation; but it is still a structure even though some of its parts may be movable, as, for instance, about a pivot. Thus, a windmill or a turntable is a structure. A thing which is not permanently in one place is not a *structure*, but it may be "in the nature of a "structure" if it has a permanent site and has all the qualities of a structure, save that it is on occasion moved on or from its site. Thus, a floating pontoon, which is permanently in position as a landing stage beside a pier, is "in the nature "of a structure," even though it moves up and down with the tide and is occasionally removed for repairs or cleaning. It has, in substance, all the qualities of a landing stage built on piles. So, also, a transporter gantry is "in the nature of "a structure," even though it is moved along its site. It has the same qualities as a fixed gantry, save that it moves on its site. Applying this interpretation to the facts of this case, I think that a tilting furnace is "in the nature of a structure." It has a permanent site and has the same qualities as any other furnace, save that it moves. The only difference is that, in order to run off the molten ore, it is tipped up instead of being tapped. Again, the mains are " in the nature of a structure." They have a permanent site and have the same qualities as any fixed mains, save that they are moved occasionally for cleaning or repairs.

I must say a word as to *South Wales Aluminium Co., Ld.* v. *Neath Assessment Committee* (1). If that decision turned on the question whether the cell was in the nature of a building, I cannot agree with it. The Act only requires it to be " in the " nature of a structure," and a structure is often not a building; a crane gantry or a turntable is a structure, but not a building. Again, if the decision turns on the fact that the cell was a receptacle, I cannot agree with it. A vat is a receptacle, but it may also be a structure.

Upon the primary facts in this case there was only one conclusion to which a tribunal could reasonably come, namely, that the tilting furnaces and mains were " in the " nature of structures," and were, therefore, rateable. I find myself in full agreement with the Divisional Court on this point. The Divisional Court, however, assessed the tilting furnaces on the contractor's basis—not on the unit basis. I cannot understand why they did so. The learned recorder had made it clear that if they were rateable, he would have assessed them on the same basis as the other furnaces, namely, the unit basis. The Divisional Court held that they could not interfere with his assessment in regard to the other furnaces, and I do not see how they could interfere in regard to the tilting furnaces. The figure of 5,937*l.* found by the Divisional Court should, therefore, be reduced to 2,437*l.* I say nothing as to the electrical plant. The point was not argued before us, as it is covered by a previous decision of this court.

The result is that the Divisional Court were right in dismissing the appeal by the rating authority and the assessment committee in respect of the assessment of the furnaces and coke ovens, and right in allowing their appeal in respect of the rateability of the tilting furnaces and mains, but wrong in their assessment of them. That means that the appeal of the occupiers should be allowed and the assessment varied accordingly, and the appeal of the rating authority should be dismissed.

(1) [1943] 2 All E. R. 587.

JENKINS J. The first question, which concerns the learned recorder's reduction of the assessment by 6,090*l.* in respect of four blast furnaces, two fixed steel melting furnaces and sixty-nine coke ovens, arises in this way. The learned recorder accepted in the main the method of valuation propounded by the rating authority and assessment committee, which was the method known as "the contractor's theory" of valuation. This method, as I understand it, consists of estimating, by reference to its condition, efficiency, and so forth, the effective capital value of a given subject of assessment, and taking as its net annual value a percentage estimated as representing the return which a contractor providing the subject of assessment for letting or hire to an occupier would expect to receive on his outlay represented by the effective capital value. The learned recorder made certain adjustments in favour of the company in the valuation arrived at on the "contractor's theory," against which the rating authority and assessment committee did not seek to appeal. But as regards the four blast furnaces, two fixed steel melting furnaces and sixty-nine coke ovens, he rejected this method altogether in favour of an alternative method propounded on behalf of the company, known as the "unit method" of valuation. This method, as I understand it, involves a direct estimate of the net annual value of the given subject of assessment by reference to comparative evidence of the net annual values assessed on similar subjects elsewhere. It seems to be called the "unit" system because it is commonly applied to multiple installations, such, for instance, as coke ovens. If, for example, the subject in question is a battery of five coke ovens, evidence may be adduced of the annual values placed on batteries of varying numbers of similar coke ovens elsewhere to support a figure of so much per oven as the "unit" in the calculation, and the "unit" figure so arrived at multiplied by five will, according to this method, represent the annual value of the battery in question. The learned recorder found that the blast furnaces and melting furnaces have in part to be renewed or rebuilt every five years at a cost not far below their original cost of construction, and that the coke ovens had an overhaul, at proportionately similar expenditure, once in every fifteen years. On these facts he held (in effect) that, having regard to the "short-lived" character of the plant in question, "it would be very forced and anomalous from the "tenant's point of view" to base the rent on the capital value, and that such parts of the blast furnaces, melting furnaces and coke-ovens as had a shorter life than twenty years should not be valued on that basis, but on a unit valuation He then proceeded to fix figures of net annual value for each of the four blast furnaces, two fixed steel melting furnaces and sixty-nine coke ovens, the resulting aggregate figure being less by 6,090*l*. than the figure representing the net annual value of the same items arrived at on the "contractor's theory."

Counsel for the rating authority and assessment committee strove in the Divisional Court, and again before us, to show that in arriving at this conclusion the learned recorder had erred in law. I entirely agree with the Divisional Court that no error in law has been made out. The adoption of the "unit" method for these particular items was, I think clearly, as the Divisional Court held, no more than a step in the calculation of the net annual value of the hereditament as a whole, and did not involve the error of treating those items as a separate hereditament. The question whether the "contractor's theory" of valuation, in relation to assets such as these, makes adequate allowance for the hypothetical tenant's liability under s. 22, sub-s. 1 (*b*), of the Rating and Valuation Act, 1925, to "bear the cost of the repairs and insurance "and the other expenses, if any, necessary to maintain the "hereditament in a state to command" the estimated rent, is, I think clearly a question of fact. Mr. Rowe, for the rating authority and assessment committee, contended that full allowance was made for this liability by the "contractor's "theory," based, as it is, on the "effective capital value" of the item in question and not simply on capital cost without any allowance for obsolescence, and so forth. Mr. Comyns Carr contended the contrary. I fail to see how any conclusion in favour of either contention could be reached without hearing all the evidence on both sides. The learned recorder, having heard the evidence, decided (in effect) that the "contractor's "theory" did not make adequate allowance for the hypothetical tenant's liability to repair and maintain these "short-lived" assets. That is simply a finding of fact, and I can see no justification for reopening it on appeal.

Mr. Rowe further argued (as I understood him) that although under s. 22, sub-s. 1 (*b*), the rent which the hypothetical tenant would be prepared to pay is estimated on the footing that he is to be liable for the cost of repairs and maintenance, the life of the asset in question is irrelevant when the "contractor's "theory" is followed, because the hypothetical contractor

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would expect, in addition to the maintenance of the capital value of the asset, precisely the same return on his outlay in providing it, whether its life was five or fifty years. I can derive no assistance from this line of argument. So far as I can see, it can be contended with at least equal plausibility that a tenant who would be prepared to pay, say, 5 per cent. on a capital value of, say, 100,000*l.*, in addition to providing a yearly contribution to a sinking fund at a rate sufficient to replace the 100,000*l.* in fifty years, would only be prepared to pay a substantially lower percentage, if his yearly sinking fund contribution had to be at a rate sufficient to replace the 100,000*l.* in only five years; for, if it is assumed that the hypothetical tenant would be equally prepared to pay 5 per cent. in both cases, one gets the result (ignoring interest on sinking fund contributions) that each year's enjoyment of the asset would cost the hypothetical tenant in the former case only 7,000*l.* and in the latter case as much as 25,000*l.* Trade conditions might, of course, be such that the hypothetical tenant could see his way to earning by his use of the wasting asset upwards of a quarter of its capital value each year. If so, the hypothetical contractor would, no doubt, get his 5 per cent. If not, he would have to abate his demands, or else go without a tenant. Considered in vacuo, that is to say, apart from the facts and circumstances of a particular case, this argument seems to me to carry the matter no further one way or the other; and I fail to see how it can in any way advance the contention that the learned recorder erred in law in refusing to apply the "contractor's theory" with respect to the items in question. For these reasons I am of opinion that the Divisional Court was clearly right in affirming the learned recorder's decision on the first question.

The second and third questions, as to the rateability of the five tilting furnaces, as to the rateability of certain gas mains and hot and cold blast mains, can be taken together, as, so far as these questions involve any question of law, both turn on the true construction of the criterion of rateability provided with respect to things of these kinds by s. 24 of the Rating and Valuation Act, 1925 and the Plant and Machinery (Valuation for Rating) Order, 1927, made thereunder. Section 24 (putting it shortly) provides by sub-s. 1 that (with an exception not material for the present purpose) in the valuation of any hereditament for rating purposes: "(*a*): All such plant or "machinery in or on the hereditament as belongs to any of the

" classes specified in the third schedule to this Act shall be " deemed to be a part of the hereditament. (*b*): Subject as " aforesaid, no account shall be taken of any plant or machinery " in or on the hereditament." Sub-sections 3, 4 and 5 contain the mechanism under which the Plant and Machinery (Valuation for Rating) Order, 1927 has been made and takes effect as if it were substituted for the third schedule to the Act. The order sets out in a schedule the various " class of machinery " and plant to be deemed to be part of the hereditament." The relevant class for the present purpose is class 4. That class contains an enumeration of particular items of machinery and plant introduced by these words: " The following parts of " a plant or a combination of plant and machinery whenever " and only to such extent as such part is, or is in the nature of, " a building or structure." The enumeration of particular items includes (amongst a great many other things) " furnaces," " flues " and " flumes and conduits." It also includes " elevators and hoists," " floating docks and pontoons, with " any bridges or gangways, not of a temporary nature, used " in connexion therewith," " foundations, settings, gantries, " supports, platforms and stagings for plant and machinery," " tanks," " vats " and " windmills."

The facts found by the learned recorder with respect to the five tilting furnaces and with respect to the gas mains and the hot and cold blast mains, are stated in the case stated. [His Lordship read them.] The learned recorder's reasons for holding that the items in question were not rateable are not stated in the case. After stating the facts as above, he disposes of the matter in the following two short paragraphs: " *Con-* " *tentions*. It was contended before me by the occupiers " that the plant and machinery referred to in paras. 16 and 17 " of this case was not rateable plant and machinery; while the " authority and the committee contended that the said plant " and machinery was rateable in law. *Decision*. I accepted " the contentions of the occupiers and held that all the afore- " said plant and machinery was not rateable in law or in fact " and excluded the same when arriving at the aforesaid net " annual value of 58,000*l*."

The Divisional Court, however, on reference to the relevant passages in the learned recorder's judgment, came to the conclusion that the learned recorder's reason for his decision was that these items being movable, and the tilting furnaces being moreover moved when in use, could not be " buildings or "structures or in the nature of buildings or structures" within the meaning of the opening words of class 4 in the schedule to the order of 1927. I agree with the Divisional Court that the judgment does show quite clearly that the learned recorder's decision did proceed on this ground. In other words, I think he construed the requirement to the effect that items of the types described in class 4 must, in order to be rateable, be "buildings or structures or in the nature of "buildings or structures" as making physical attachment to the soil an essential condition of rateability in these cases. The Divisional Court further held (in effect) that this was a misconstruction of the criterion of liability prescribed in the order of 1927 with respect fo class 4, and therefore involved an error in law. With this conclusion I also agree.

Mr. Comyns Carr contended that the learned recorder in deciding that these particular items were not rateable was simply deciding questions of fact, on which his conclusion should not have been disturbed by the Divisional Court. I quite agree that in general the question whether a particular item of one of the types listed in class 4 is or is not a building or structure or in the nature of a building or structure is a question of fact. But the learned recorder here has placed a special (and, as I have said, in my view, erroneous) construction on the expression "building or structure or in the nature of a "building or structure" and has held that the particular items in question do not fall within the expression as so interpreted. That is clearly a decision involving a question of law, namely the true construction of the relevant part of the order of 1927.

It would be undesirable to attempt, and, indeed, I think impossible to achieve, any exhaustive definition of what is meant by the words "is or is in the nature of a building "or structure." They do, however, indicate certain main characteristics. The general range of things in view consists of things built or constructed. I think, in addition to coming within this general range, the things in question must, *in relation to the hereditament*, answer the description of buildings or structures, or, at all events, be in the nature of buildings or structures. That suggests built or constructed things of substantial size: I think of such size that they either have been in fact, or would normally be, built or constructed on the hereditament as opposed to being brought on to the hereditament ready made. It further suggests some degree of permanence in relation to the hereditament, i.e., things which once installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces. I do not, however, mean to suggest that size is necessarily a conclusive test in all cases, or that a thing is necessarily removed from the category of buildings or structures or things in the nature of buildings or structures, because by some feat of engineering or navigation it is brought to the hereditament in one piece. For instance, floating docks or pontoons, items specifically mentioned in class 4, would not, I think, be excluded merely on account of having been towed complete to the hereditament instead of having been built or constructed there. The question whether a thing is or is not physically attached to the hereditament is, I think, certainly a relevant consideration, but I cannot regard the fact that it is not so attached as being in any way conclusive against its being a building or structure or in the nature of a building or structure. This is, I think, clearly shown by some of the items specifically mentioned in class 4; e.g., floating docks and pontoons would necessarily not be so attached. Nor can I regard the fact that a thing has a limited degree of motion in use, either in relation to the hereditament or as between different parts of itself, necessarily prevents it from being a structure or in the nature of a structure, if it otherwise possesses the characteristics of such. The list in class 4 includes such things as elevators and hoists, transporter gantries, transversers and turntables, and weighbridges. It is true that things in class 4 are rateable only "to such "extent" as they are buildings or structures or in the nature of buildings or structures; but I cannot regard this as necessarily excluding from rateability the movable parts of things which from their inclusion in the list are clearly regarded as capable of being in the nature of buildings or structures and from their very description must clearly possess some degree of mobility in relation to the hereditament or as between the different parts of themselves.

On the facts found by the learned recorder, it is, in my view, clear that, once the false criterion of movability or physical attachment to the hereditament is discarded, the tilting furnaces and mains, to which the second and third questions relate, are structures or in the nature of structures within the meaning of the order of 1927. I think, so far as the tilting furnaces are concerned, the true view is that the entire installation in each case from the concrete supports upwards constitutes a single structure or thing in the nature of a structure for this purpose. But I would be prepared, if necessary, to hold that the actual body of the furnace in each case is in itself a structure or in the nature of a structure, in which case the supports would still be rateable under the special item of foundations, etc., included in class 4. I do not, however, think that the separate mention in the class of foundations, etc. (which would include the foundations, etc., of non-rateable things) precludes the supporting members of a given piece of plant from being treated as forming part of and constituting one entire structure with the piece of plant in question where, as I think is the case as regards any one of the tilting furnaces here, the whole, from supports upwards, constitutes a single functional entity.

For these reasons, I agree with the Divisional Court that the learned recorder's decision on the second and third questions cannot stand, and that the items in question should be held to be rateable. With respect, however, it seems to me to be clear that the proper addition to the net annual value on account of the five tilting furnaces should be 2,437*l*. only, being the figure arrived at by the learned recorder on the "unit" basis of valuation, which he held (with the approval of the Divisional Court) to be the method by which "short-" lived" assets should be valued. Accordingly (apart from the question of costs, which is reserved for further argument), I would only allow the appeal to the extent of substituting 2,437*l*. for 5,937*l*. as the increase in the net annual value to be made in respect of the five tilting furnaces, and would dismiss the cross-appeal.

Bucknill L.J. I agree with the judgments which have been delivered by my brethren, and have nothing to add.

Appeal of occupiers allowed.
Cross-appeals dismissed.

Solicitors for the occupiers: *Llewellyn & Hann, Cardiff.*

Solicitors for the rating authority: *Theodore Goddard & Co., for S. Tapper Jones, Town Clerk, Cardiff.*

Solicitors for the assessment committee: *Theodore Goddard & Co., for W. J. Thomas, clerk to the Cardiff Assessment Committee.*

C. G. M.

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Dec. 20;
1949.
Jan. 11.

Lord Goddard C.J., Lewis and Pritchard JJ.

Criminal law—Murder—Chance medley—Applicability of doctrine—Justifiable and excusable homicide—Provocation.

The doctrine of chance medley has no longer any place in the law of homicide. The cases cited under the heading chance medley are to be regarded merely as illustrations of what the courts have accepted as sufficient to reduce a killing from murder to manslaughter, and all of them must now be read in the light of *Holmes* v. *Director of Public Prosecutions* [1946] A. C. 588 and *Mancini* v. *Director of Public Prosecutions* [1942] A. C. 1.

APPEAL from conviction.

The appellant was charged with murdering Joseph Gibbons and was convicted of that crime at Stafford Assizes, at a trial before Hallett J. and was sentenced to death. The appellant, in the late evening of October 10, 1948, was walking, with a young woman past the Talbot Hotel at Newcastle-under-Lyme, when one of three men standing there made an observation about the young woman which the appellant resented. The three men were the deceased, Charles Stanley and Robert Woodyatt. The appellant and the woman had passed the three men when the observation was made, but the appellant went back to them and struck Robert Woodyatt with his hand or fist causing him to fall to the ground. The appellant admitted that the blow was the first to be struck. Thereafter the deceased invited Woodyatt to fight the appellant and Woodyatt got up from the ground and began to take his coat off as though preparing for a fight. Two unidentified by-standers restrained the appellant by holding his arms, and the appellant so held was uttering threats to the deceased and Woodyatt. The appellant, then broke away from those who held him and, producing a knife, advanced on Woodyatt and the deceased, saying, "I'll get the two of them." In the scuffle which followed the deceased was stabbed through the heart. Woodyatt and Stanley were also wounded by the appellant's knife which was not found after the killing. No one, other than the appellant, had any knife at any time during the affray. The appellant was a native of Malta and had had some experience as a sparring partner to a professional boxer.

1948. Dec. 20. *Cartwright Sharp K.C.* and *E. B. Gibbens* for the appellant. On the facts in this case, there was a killing

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by chance medley. If two men quarrel and fight, and either or both of them are armed with a lethal weapon, and in the heat of the fight one draws and uses the weapon with fatal results, that is causing death by chance medley and amounts to manslaughter, unless the jury find that from the commencement he intended to use the lethal weapon and was armed for that purpose. [They referred to *Rex* v. *Taylor* (1); *Rex* v. *Snow* (2); and *Reg.* v. *Smith* (3).] Hallett J. directed the jury that before the defence of chance medley could be established it must be proved that the provocation was such that the act which caused the death was commensurate with the provocation received. The doctrine of provocation had no application to chance medley. The trial judge, in his summing up, had further misdirected the jury, on several occasions, by directing them that there was no evidence that the prisoner had ever been struck.

Sachs K.C. and *Norman Carr* for the Crown. Since the year 1680 chance medley had been nothing more than a name for self-defence. It referred to a type of killing which was excusable. It was excusable homicide as opposed to manslaughter and was used in a very wide sense which nowadays would be called accidental killing. They referred to *Woodburne's* case (4); Roscoe's Criminal Evidence, 15th ed., p. 854; Blackstone's Commentaries, vol. iv., p. 185; Russell on Crime, 9th ed., p. 505; Hale's Pleas of the Crown, vol. 1, pp. 471, 473; East's Pleas of the Crown, vol. 1, pp. 220, 221; Hawkin's Pleas of the Crown, vol. 1, pp. 84-89; and 24 Henry 8, c. 5.

There had been no misdirection. Where loss of control through heat or passion reduced the killing to manslaughter, there was only one law applicable—provocation—and with regard to that the trial judge had been entirely right, and put the case as high as he could for the defence. The particular facts, in this case, cannot be said to have caused loss of control of a type that would be sufficient to reduce the killing from murder to manslaughter. [They referred to *Holmes* v. *Director of Public Prosecutions* (5).]

Jan. 11, 1949. The judgment of the court (Lord Goddard C.J., Lewis and Pritchard JJ.) was read by Lord Goddard C.J.

(1) (1771) 5 Burr. 2793.
(2) (1776) 1 Leach 151.
(3) (1837) 8 C. &. P. 160.
(4) (1722) 16 St. Tr. 54.
(5) [1946] A. C. 588.

The first and main contention of counsel for the appellant was that there was here, on the facts, a case of killing by chance medley, and that there was no proper direction and, indeed, actual misdirection on this subject. He contended that the summing-up amounted to a direction that, before the defence of chance medley could be established, it must be proved that the provocation was such as would cause a reasonable man to lose control and that the act which caused the death was commensurate with the provocation received. This, he contended did not apply to chance medley, to which the doctrines relating to provocation had no application. The first and most important thing, then, is to understand what the expression " death by " chance medley " means. The contention was that, if two men quarrel and fight, and either or both of them are armed with a lethal weapon, and in the heat of the quarrel one draws and uses the weapon with fatal results, that is causing death by chance medley and amounts to manslaughter, unless, and only unless, the jury find that the one all along intended to cause the death of the other and was armed for that purpose. In truth, this is not what was ever meant by the expression " death by " chance medley." If the finding of the jury established that the death was caused by chance medley, the prisoner escaped any corporal penalty and was not convicted of manslaughter, but the expression, as we hope to show, has now no place or importance in the law relating to homicide. A reference to Blackstone's Commentaries, book IV., p. 184; Hale's Pleas of the Crown, vol. 1, p. 470 and Hawkin's Pleas of the Crown, pp. 84-89, makes it clear that this expression applied only where the killing was se defendendo, that is in defence of a man's person or property upon some sudden affray, and, probably also where the killing was per infortunium, and, in either case, where the law would attach some degree of blame for the killing but would excuse it. It was excusable as opposed to justifiable, homicide. The latter includes cases of unavoidable necessity, such as a householder, attacked by an armed burglar, killing the latter as the only means of protection against the attack. It includes also killing in execution of sentence of death pronounced by a lawful court, or of rioters, if the riot cannot otherwise be suppressed, or in arresting a felon where resistance cannot otherwise be overcome. Where, however, the killing was the outcome of a quarrel or fight, it was excusable though not justifiable, if the killer had not begun but had taken part in the fight, or if having begun it, he endeavoured to decline any further struggle and retreated, but, being closely pressed killed his antagonist to avoid himself being killed or maimed. This is the result of the authorities to which we have been referred. The expression seems also to have been applied to cases where the killing was due to misadventure in the performance of a lawful act and where there was no such negligence in its performance as would amount to manslaughter, but we need not explore the refinements of the old law regarding death per infortunium. The result was the same as in case of death se defendendo. It is obvious that at the present day there would, in such cases, be no room for any verdict but one of "not guilty." Indeed, the Offences against the Person Act, 1861, s. 7, expressly provides: "no punishment or forfeiture shall be incurred by "any person who shall kill another by misfortune or in his "own defence, or in any manner without felony." This section replaces and re-enacts 9 Geo. 4, c. 31, s. 10, and the appearance of the word "forfeiture" helps to solve any difficulty that may be felt as to the distinction which formerly existed between justifiable and excusable homicide. Some degree of blame attached to the man who killed another with whom he was fighting, though the killing was in his own defence, for he ought not to have engaged in a fight. He was excused from suffering a penalty, but his goods were liable to be forfeited to the King, and, both in the case of death caused se defendendo and per infortunium, the thing by which the death was caused was forfeited as a deodand. It seems that where there was room for a verdict of chance medley, the court directed the jury to find a special verdict, and if on the facts found the court decided that it was a case of death by chance medley, no corporal sentence on the prisoner was passed, but forfeiture of his goods and the deodand was ordered. Sir James Fitzjames Stephen, who was the greatest and most authoritative institutional writer on the criminal law of last century, nowhere in his History or in his Digest of the Criminal Law refers to death by chance medley as such. He does deal at length with death per infortunium and se defendendo and gives a full review of Foster's Treatise on Homicide, as it refers to this matter. He points out that Foster implies that by his time—his work was published in 1762—special verdicts finding justifiable or excusable homicide had fallen into disuse and the judges were taking general verdicts of acquittal in plain cases of per infortunium and se defendendo. The learned author goes on to say that the law in this subject may be considered to have fallen into desuetude in the course of the eighteenth century, and it was finally abolished in 1828 by the Act of George 4 to which we have already referred. Deodands, indeed, retained their legal existence until 1846 when they were abolished by 9 & 10 Vict., c. 62. As a matter of some historical interest, it is probable that what led to the passing of the latter Act was that the London and Birmingham Railway Company had a year or two earlier been amerced in the sum of 2,000*l.* representing the value of a railway engine that had run over and killed a man, thus becoming a deodand. It was, accordingly, necessary to adapt the law to modern conditions, and as the law on the subject was too firmly established to be modified by judicial decision, the change had to be effected by statute.

Counsel for the appellant drew our attention to *Rex* v. *Taylor* (1), *Rex* v. *Snow* (2) and *Reg.* v. *Smith* (3), in support of his argument. In none of these cases was chance medley mentioned by any of the judges who decided them. They are all cases which turn on whether there had been provocation enough to reduce the crime to manslaughter. No one doubts that blows, and, probably, threatening gestures, if near enough and serious enough to cause loss of control, may justify and, indeed, require the killing to be regarded as manslaughter only. At a time when society was less secure and less settled in its habits, when the carrying of swords was as common as the use of a walking stick at the present day, and when duelling was regarded as involving no moral stigma if fairly conducted, it is not surprising that the courts took a view more lenient towards provocation than is taken to-day when life and property are guarded by an efficient police force and social habits have changed. It is enough to say that *Holmes* v. *Director of Public Prosecutions* (4), affirming the decision of this court, lays down rules on the subject which are authoritative and are to be followed by all courts when the question of provocation becomes an issue in relation to killing as the outcome of a quarrel or a fight. The old learning, such as it was, with regard to chance medley has long been obsolete and was finally laid to rest by 9 Geo. 4, c. 31. The doctrine has no longer any place in the law of homicide and we may express the hope that it will no longer appear in Archbold's Criminal Pleading

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(1) 5 Burr. 2793.

(2) 1 Leach 151.

(3) 8 C. & P. 160.

(4) [1946] A. C. 588.

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Evidence and Practice, as though it were an existing doctrine. The cases cited under that heading are to be regarded as illustrations of what the courts have accepted as sufficient to reduce a killing from murder to manslaughter and all of them must now be read in the light of *Holmes'* case (1) and *Mancini* v. *Director of Public Prosecutions* (2), which preceded it.

Appeal dismissed.

Solicitor for the appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) [1946] A. C. 588. (2) [1942] A. C. 1.

L. F. J. McD.

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Oct. 21, 22, 25;
Nov. 25.
Morris J.

BUCKLAND *v.* GUILDFORD GAS LIGHT AND COKE COMPANY

Negligence—Electric wires of high voltage passing over top of easily climbable tree—Wires hidden by foliage—Young girl climbing tree electrocuted—Liability of electric supply company—Tree on land not occupied by company—Question whether girl a trespasser immaterial—Dangerous trap—Tree allurement to children—Electric supply company liable.

The defendants were an electrical undertaking. Their overhead electric wires passed about 2 feet above an easily climbable tree in a certain field. The wires were charged with a lethal voltage of 11,000 volts. They were hidden by the foliage of the tree from anyone who happened to be standing directly underneath it. Traversing the field was an unfenced footpath over which there was a public right of way. The tree was about 90 yards distant from the nearest point on the footpath. There was no danger notice placed on or near the tree. On the other hand, a danger notice had, according to statutory requirements, been affixed to the supporting pole about 40 yards on each side of the tree. The plaintiff's daughter, who was of the age of thirteen years, was a member of a party of school girls who had been staying at a school camp about a mile and a quarter distant from the field, and she and her school companions had been in the habit of frequently visiting a farm adjoining the field for the purpose of watching the milking of the cows. The occupier of the farm which they visited had grazing rights over the field. In order to reach the farm the girls were in the habit of crossing the field by means of the public footpath. There was no evidence that the girls had been forbidden to stray from the footpath

[Reported by J. H. G. Buller, Esq., Barrister-at-Law.]

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into the field. On the other hand the bailiff of the farm which they visited gave evidence that he had not given them any permission thus to leave the footpath. One day the plaintiff's daughter who had entered the field with a party of her companions left the footpath, went to the tree and climbed it. As the result of climbing the t~~h~~ree she was electrocuted by coming into contact with one or more of the wires. The plaintiff brought an action against the defendants whereby he alleged that his daughter's death was due to the negligence of the defendants, and he, as her personal representative, claimed damages against them under the Law Reform (Miscellaneous Provisions) Act, 1934, and on behalf of himself and his wife as her parents claimed damages against them under the Fatal Accidents Acts, 1846 to 1908. The defendants' principal defence consisted of the allegation that the girl was a trespasser and that they therefore owed no duty to her.

Held, that (1.) although the burden of proving that the deceased girl was lawfully in the field would have been on the plaintiff if the defendants had been owners or occupiers of it, nevertheless, as they were not the owners or occupiers of it, the burden of proving that the girl was a trespasser in the field was on the defendants, and they had failed to discharge that burden; (2.) in the circumstances of the case the girl belonged to that class of persons whom Lord Atkin in *Donoghue* v. *Stevenson* [1932] A. C. 562 at p. 580 had called "neighbours," namely, those persons whom the defendants ought reasonably to have had in contemplation as being likely to be affected by their act in bringing their electric wires into such close proximity to an easily climbable tree as to constitute a hidden and deadly trap; (3.) even if the girl had been a trespasser vis-à-vis the owner or occupier of the field, she would still in the circumstances of the case, have belonged to that class of persons whom Lord Atkin had called "neighbours," for, although as a general rule a trespasser on land would not be regarded as being within the class of "neighbours," yet the class of persons who must be regarded as "neighbours" from the point of view of the defendants was not of rigid necessity the same as the class of persons who must be regarded as invitees or licensees from the point of view of the owner or occupier of the land, and in the circumstances of the case the defendants ought reasonably to have had in contemplation that an easily climbable tree visible to a bright and healthy school girl from a nearby footpath, even though in climbing it she would be a trespasser vis-a-vis the owner or occupier of the field, would present an alluring attraction to her; (4.) the defendants in maintaining highly dangerous wires had been guilty of negligence in failing to carry out their duty of safeguarding the deceased girl from a hidden deadly trap and they were accordingly liable to the plaintiff under the provisions of the Acts under which he had claimed.

Robert Addie & Sons (Collieries), Limited v. *Dumbreck* [1929] A. C. 358, distinguished.

ACTION.

The plaintiff Buckland sued as personal representative of

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the estate of his deceased daughter Iris Buckland under the Law Reform (Miscellaneous Provisions) Act, 1934, and on behalf of himself and his wife as parents of the deceased (who was thirteen at her death) under the Fatal Accidents Acts, 1846 to 1908.

It was alleged that the deceased girl met her death by coming into contact with one or more electric wires charged with a lethal voltage of 11,000 volts, and belonging to the defendant electric supply company.

The defendants pursuant to statutory powers provided electric current for the district in which Coneyhurst Farm, Ewhurst, Surrey, is situate, and they laid overhead electric cables or wires which passed about 2 feet above the top of an easily climbable oak tree about 18 feet high in a field over which the farmer of Coneyhurst Farm had grazing rights and which were hidden by the tree's foliage from anyone who happened to be standing at the foot of the tree. The wires were supported by poles about 80 yards apart, and the tree was about mid-way between two of such poles, both situate in the field. The defendants had complied with reg. 19 of the Overhead Line Regulations, 1928, which required them to have a danger notice affixed to each supporting pole, but no danger notice was placed on or near the tree. Under the terms of an agreement made on January 7, 1933, between the defendants and the owner of the land in which the field was situate the defendants undertook to maintain the overhead wires and installations in good repair and condition, and so as not to be a danger to the owner or his lessees or tenants, or to his or their property or employees, and also that in certain circumstances they would indemnify the owner and his tenants or occupiers against losses or damages or expenses which they might suffer by reason of any wrongful act, negligence or omission on the part of the defendants.

Just before her death the deceased girl had been staying at a school camp at Ewhurst, Surrey, about a mile and a quarter distant from the field containing the tree. On June 21, 1947, the deceased girl, together with several other school companions, entered the field by a public footpath. The girls in the camp had been in the habit of using the footpath in order to visit the farm, and the purpose of their visit was, with the consent of the farmer, to watch the milking of his cows. His bailiff testified that he had given no permission to the girls to stray from the footpath into the field. On the other hand

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no evidence was forthcoming that the farmer or the owner of the field had forbidden the girls to wander over the field. On this occasion the deceased girl left the footpath and went to the tree which was about 90 yards distant from the nearest point on the footpath. Having arrived at the tree she climbed it. When she reached the top of the tree some part of her body must have come into contact with one or more of the wires, because she was electrocuted and apparently instantly died.

Astell Burt for the plaintiff. The rules governing the position of occupier and trespasser have no application unless it can be shown that one party was the occupier and the other the trespasser. It is admitted in this case that the defendants were not occupiers of the field in question.

Alternatively the defendants have failed to establish that the deceased child was a trespasser. In the decided cases dealing with children who have been in and about land, notices have been displayed to the effect that trespassers will be prosecuted, or warnings have been given. *Excelsior Wire Rope Co., Ld.* v. *Callan* (1); *Mourton* v. *Poulter* (2); *Hardy* v. *Central London Ry.* (3); *Liddle* v. *Yorkshire* (*North Riding*) *County Council* (4). In this case no notices were displayed and no warning was given to the school girls not to wander on to the field.

The only evidence with respect to the position of the child was that the farm bailiff had not given the child permission to be on the field in question. The land was owned by a Mrs. Webb, but there was no evidence as to what her attitude was. The farmer had grazing rights over the field, but there was nothing to show that he had any right in rem in the field. There was no evidence as to what the attitude of the farmer was. There was evidence that children frequently visited the farm for the purpose of seeing the milking.

The defendants having placed a dangerous thing in situ were under a duty to take all reasonable steps to protect from anticipated injury all such persons whom they might reasonably expect to be upon the land. The defendants failed to take any such steps although in the words of their own witness the tree together with the wires concealed by its foliage was a death trap to any person who climbed the tree.

(1) [1930] A. C. 404.
(2) [1930] 2 K. B. 183.
(3) [1920] 3 K. B. 459.
(4) [1934] 2 K. B. 101.

Moreover the tree constituted an allurement as well as a death trap.

It follows that, having regard to all the circumstances, the defendants acted with reckless disregard of the safety of children who might reasonably be expected to climb the tree and would therefore be liable even if the child was a trespasser.

A. Melford Stevenson K.C. and *J. Harcourt Barrington* for the defendants. Our principal defence is that the girl was a trespasser and, therefore, the defendants owed her no duty. I admit that the defendants were not owners or occupiers of the field, nevertheless, their duty to the girl was no higher than was the duty of an owner or occupier towards a trespasser and that duty was merely the negative duty of not being guilty of malicious or reckless conduct. *Walder* v. *Hammersmith Borough Council* (1), *Adams* v. *Naylor* (2), *Robert Addie & Sons (Collieries), Ld.* v. *Dumbreck* (3).

The proposition that the defendants had a duty to safeguard the girl even if she was a trespasser would involve the assumption that they ought to have expected that she would trespass into the field by straying from the footpath, and it would also involve the assumption that they ought to have expected that she would climb the tree. Scrutton L.J. in *Liddle* v. *Yorkshire North Riding County Council* (4) in citing with approval Holmes J. in the United States of America case of *United Zinc and Chemical Co.* v. *van Britt* (5) rejected the proposition that a land owner should expect a child to trespass on to his land. As regards the further assumption that the defendants ought to have expected that the girl would climb the tree, it is submitted that their position in this respect is not different from that of the railway company in the United States of America case of *New York, Newhaven & Hartford Ry. Co.* v. *Fructer* (6), where it was held that the railway company owed no duty to a young boy who climbed up the girder of the company's bridge and then up a steel latticed tower with the result that he was injured by coming into contact with some electric wires which were fixed to cross arms connected with the tower.

If the wires were invisible to the girl as the plaintiff contends, then they could not have been an allurement to her. The only thing which could have been an allurement to her was the

(1) [1944] 1 All E. R. 490.
(2) [1944] K. B. 421.
(3) [1929] A. C. 358, 365, 371.
(4) [1934] 2 K. B. 100, 109, 110.
(5) (1922) 258 U. S. 268, 275.
(6) (1922) 260 U. S. 141.

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tree, but nothing which the defendants did gave to it any attractive qualities which it did not already possess.

Even if the wires passing over the tree were in th nature of a trap, they were merely in the nature of a continuing trap, and therefore, on the authority of *Mourton* v. *Poulter* (1) the defendants had no duty at common law to warn a trespasser even a child trespasser. The court in that case decided that a wood cutter had a duty to warn children trespassers that a tree was just about to fall, and Scrutton L.J. stated (2) that a man who without warning even trespassers fired a blast and injured any of them, was liable, but he quite clearly drew the distinction between doing something which made a change on the land such as felling a tree or firing a blast and the case where there was on the land a continuing trap such as an innocent looking pond which contained poisonous matter as in the United States of America case of *United Zinc & Chemical Co.* v. *van Britt* (3). In such a case Scrutton L.J. laid down that as the land merely remained in a continuing state a trespasser must take it as he found it

That is our case here. If the wires passing over the tree constitute a dangerous trap that trap was a continuing trap and there was no duty to warn trespassers of its presence even infant trespassers. The case of felling a tree or of firing a blast without warning would come under the head of reckless conduct which would create a liability even to a trespasser. There was no such reckless conduct here.

Even if the defendants were negligent which we deny, the girl contributed to their negligence, because she ought with ordinary care to have seen the wires before she reached the tree.

MORRIS J. stated the facts and continued : The conclusion which I think it is reasonable to draw from the evidence is that the girl climbed the tree without realizing that she was heading towards live electric wires, and that she suddenly came into contact with them and was instantly killed. The girl was not taking part in any arranged visit to the farm.

On behalf of the plaintiff it was submitted that having placed some dangerous thing on the land of another, the defendants were under a duty to take steps to protect persons who might be on the land from dangers which could reasonably

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(1) [1930] 2 K. B. 183.

(2) Ibid. 190, 191.

(3) 258 U. S. 268.

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be anticipated. It was further contended that a climbable tree constitutes an attraction to children, and that the defendants were under a duty not to permit live wires to pass so close to or above such a tree, that one climbing the tree would or might come in contact with the live wires.

On behalf of the defendants it was submitted that the girl was a trespasser and that the defendants owed no higher duty to her than would be owed by an occupier of land towards a trespasser, and that an occupier under the circumstances would have been under no liability to a tree-climbing trespasser. Further, it was said that the girl was guilty of contributory negligence. Also it was urged that nothing done by the defendants caused the existence of any allurement attractive to a child and that the defendants had no reason to anticipate that the girl would trespass or, whether a trespasser or not, would climb the tree.

In the presentation of the careful and helpful arguments, reference was made to many authorities. On the view which I have formed on the evidence, it cannot be said that the girl committed any act of trespass in regard to any part of the installation of the defendants. It seems reasonable to conclude that she was unaware that as she climbed she was nearing death-dealing wires. There was some evidence that she was not knowledgeable about the nature of and the dangers of live overhead wires, and it is a possible view that as she climbed she thought she might pass through the foliage and then be somewhere near to overhead wires, which she may have deduced would be above the tree but the danger of which she did not realize. This does not, however, seem to me to be the correct view, and, in my judgment, the girl was not a trespasser vis-à-vis the defendants. It is said, however, that the conclusion ought to be drawn that she was trespassing on the land. The evidence of the farm bailiff, that he did not give permission for the girls to stray from the path, is put forward as the foundation upon which to base the suggested conclusion.

In a case in which a plaintiff is suing the occupier of land, it must, as a rule, be for the plaintiff, as part of the proof of facts showing the existence of some particular duty, to show how he or she came to be on the land. But in the present case it is the defendants who are asserting that vis-à-vis the occupier of the land, the girl was a trespasser. The owner or occupier of the land has not said so. It may be that the owner or occupier did give permission, or it may be that the arrangements made in regard to farm visits had inherent in them a permission to children from the camp, even if not making one of the planned visits, to wander over the fields which he occupied during a Saturday afternoon stroll. If the defendants wish to maintain that the girl was trespassing on the field, they must prove it. The evidence of the farm bailiff falls short of such proof.

It becomes necessary to consider whether the defendants had any, and if so what, duty to the child, and if they did owe a duty to her whether they were in breach of it, with the result that the death of the child was caused. In approaching these problems it is necessary to take account of all the relevant features and circumstances surrounding the occurrence now being investigated. As Lord Porter said in his speech in *Bourhill* v. *Young* (1): " In the case of a civil action there is " no such thing as negligence in the abstract. There must be " neglect of the use of care towards a person towards whom " the defendant owes the duty of observing care, and I am " content to take the statement of Lord Atkin in " *Donoghue* v. *Stevenson* (2) as indicating the extent of " the duty. 'You must take,' he said, 'reasonable care to " 'avoid acts or omissions which you can reasonably foresee " 'would be likely to injure your neighbour. Who, then, in " 'law is my neighbour? The answer seems to be—persons " 'who are so closely and directly affected by my act that " 'I ought reasonably to have them in contemplation as " 'being so affected when I am directing my mind to the " 'acts or omissions which are called in question'." In the same case, in his speech (3), Lord Russell of Killowen said as follows: " In considering whether a person owes to another " a duty a breach of which will render him liable to that other " in damages for negligence, it is material to consider what " the defendant ought to have contemplated as a reasonable " man. This consideration may play a double rôle. It is " relevant in cases of admitted negligence (where the duty and " breach are admitted) to the question of remoteness of damage, " i.e., to the question of compensation not to culpability, but " it is also relevant in testing the existence of a duty as the " foundation of the alleged negligence, i.e., to the question " of culpability not to compensation." Lord Russell then

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(1) [1943] A. C. 92, 116.

(2) [1932] A. C. 562, 580.

(3) [1943] A. C. 92, 101.

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proceeds to quote as follows from the judgment of Brett M.R. in *Heaven* v. *Pender* (1): " Whenever one person is by cir-" cumstances placed in such a position with regard to another " that every one of ordinary sense who did think would at " once recognize that if he did not use ordinary care and " skill in his own conduct with regard to those circumstances " he would cause danger of injury to the person or property " of the other, a duty arises to use ordinary care and skill " to avoid such danger." Then Lord Russell went on, having quoted from *Donoghue* v. *Stevenson:* " A man is " not liable for negligence in the air. The liability only arises " ' where there is a duty to take care and where failure in " ' that duty has caused damage '." Lord Macmillan in the same case said at p. 104: " There is no absolute standard " of what is reasonable and probable. It must depend on " circumstances and must always be a question of degree." Lord Wright in his speech in the same case at p. 110 said: " It is here, as elsewhere, a question of what the hypothetical " reasonable man, viewing the position, I suppose ex post facto, " would say it was proper to foresee."

In applying the tests indicated by the passages to which I have referred, it is proper, in my judgment, to have in mind the nature of the particular peril which is a reasonably foreseeable possibility. The defendants knew that the wires they maintained were so charged that instant death would probably be caused to anyone who came in contact with them. The regulations imposing obligations upon the defendants to fix anti-climbing devices and warning notices to any poles or structures carrying wires served as an additional reminder of the need to take steps to avert any possible perils attendant upon the transmission of high-voltage along wires carried overhead across the countryside. Reminder of such nature would, however, in the case of the defendants be superfluous. If underneath the wires there existed some object that reached up towards the wires, it would require no undue prescience to observe that if the object could be climbed then a path to peril might lie open. If additionally the wires, and therefore the peril, were hidden, the dangers of the situation would be all the greater.

Endeavouring to apply reasonable standards, and not seeking to require any unique gifts of pre-vision, I consider that the defendants ought to have known that it was dangerous

(1) (1883) 11 Q. B. D. 503.

to have their high-voltage wires immediately above a tree which could easily be climbed and a tree whose foliage was so dense that the presence of the wires above could not readily be seen. The fact that the tree was about 90 yards from a footpath is merely a particular additional feature of the circumstances. Applying the words of Lord Atkin in *Donoghue* v. *Stevenson* (1), the defendants owed a duty to take reasonable care to avoid acts or omission which they could reasonably foresee would be likely to injure a person so closely and directly affected by their acts or omissions that the defendants ought reasonably to have had such a person in contemplation as being so affected.

It required no vivid imagination on the part of anyone traversing the route of the wires to appreciate the great peril of having the wires above a tree that could be easily climbed, and whose foliage, being dense in the month of June, would obscure the wires. If anyone did climb the tree he would with every step approach a hidden peril of the direst kind. The facts of the present case show all too dramatically the nature of the peril. It was, in my judgment, easily foreseeable that someone might climb the tree and so might become in close proximity to an unseen deadly peril. The tree might have been felled when the wires were being erected. The tree was in fact cut down on some date after June 21, 1947. This, however, is not a circumstance that, of itself, involves any inherent admission of the prior necessity for cutting down, and it would be wrong so to regard it. The tree not having in the first instance been felled, it is manifest that many later steps could have been taken which would have prevented the happening of the fatality.

The deceased girl was, in my judgment, within the group of those whom the defendants ought to have had in contemplation. She was a "neighbour" in the sense in which that word was used by Lord Atkin in what Lord Wright calls his well-known aphorism in *Donoghue* v. *Stevenson* (1). I have given my reasons for concluding that she must not be regarded as having been a trespasser in the field. It has not been proved to me that she was. But even if, contrary to my view on the evidence before me, the inference ought to be drawn that she was not permitted to be in the field but was a trespasser when she was by the tree, she was nevertheless in the circumstances of this case one to whom, in my judgment, the defendants owed a duty. The classifications into which persons may fall according as, in relation to the occupier of the land, they are his invitees or his licensees or are trespassing, do not have decisive significance when considering in the present circumstances the position of the defendants. The occupier of the field might owe different duties to those who were his invitees from the duties which he owed to those who were his licensees. The duties owed by the defendants to those in the two classes would be the same. If someone trespassed on the field the duties owed to him by the occupier would be most limited (see *Hardy* v. *Central London Ry. Co.* (1), *Latham* v. *Johnson* (2) and *Robert Addie & Sons* (*Collieries*), *Ld.* v. *Dumbreck* (3)). In considering whether the defendants had a duty to such a trespasser, the fact that vis-à-vis the occupier of the land the person was a trespasser would be a very relevant circumstance to have in mind, but it would not in all cases be a conclusive one. Broadly speaking, those whose presence the defendants ought to contemplate would doubtless be persons who were lawfully present on the land. Under most conditions the defendants would be entitled to assume that persons would not go unlawfully on land and would not be under obligation to provide against the contingency of persons trespassing. Though not occupiers of the land the defendants are in a position closely analogous.

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(1) [1932] A. C. 562, 580.

The group of those who must be regarded as "neighbours" from the point of view of the defendants is, however, not of rigid necessity the same as the group of those who must be regarded as invitees or licensees from the point of view of the occupier of the land. The test to be applied in considering who is a neighbour is the test indicated by Lord Atkin. As a general rule a trespasser on land would not be within the group of neighbours, but whether some particular person is a neighbour depends upon the circumstances of a particular case. I am, of course, dealing only with the one before me. If it were the fact that the deceased girl wandered 90 yards from the footpath without permission and had no actual permission to be on the land under the tree or to climb the tree, I would still, in the circumstances of this case, have regarded the child as being one whom the defendants ought reasonably to have had in contemplation, and further that her action in climbing the tree was one which they ought reasonably to have foreseen. A tree visible from a nearby footpath which may be easily climbed may, to the gaze of a bright and healthy schoolgirl, present an alluring attraction which would not suggest itself to those who are either no longer nimble or for whom heights have no fascination.

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(1) [1920] 3 K. B. 459.

(2) [1913] 1 K. B. 398.

(3) [1929] A. C. 358.

The cases dealing with what Lord Morton in the Court of Appeal in the case of *Adams* v. *Naylor* (1), called the "unenviable position of a trespasser at common law" are, in my judgment, not directly in point. Nor are the cases of *Excelsior Wire Rope Co.* v. *Callan* (2), or *Mourton* v. *Poulter* (3), directly in point where the plaintiffs recovered even though they had been trespassing. Liability in those two cases resulted from the fact that some dangerous act was done with reckless disregard of the presence of the trespassing children. It is to be noted, however, that in the former case the appellants were merely licensees and not occupiers of the land. But it was forcibly contended that inasmuch as the occupier of land is not, save on the basis to which I have just referred, liable if a trespassing child meets with injury, the liability of someone in the position of the defendants ought to be no greater. In my judgment, this does not necessarily follow. The liability, if any, of an occupier of land arises out of the fact of his occupancy and of some action of his while occupying. The extent of the liability towards children was fully stated by Lord Hailsham in his speech in *Robert Addie & Sons (Collieries), Ld.* v. *Dumbreck* (4). See also the discussion of the law by Professor Winfield in his textbook on the Law of Torts, 2nd ed., p. 626, and following pages. But the liability, if any, of the defendants is on a somewhat different basis. It arises because of a duty to take reasonable care while maintaining highly dangerous overhead wires. If the daughter of the occupier of the field had done as the deceased girl did, then, on the facts as I have found them, the defendants would be liable. But reasonable forethought on the part of the defendants would have extended to cover not only the daughter of the occupier of the land but invited playmates of the daughter and possibly some others, such as the deceased girl, in the circumstances of the present case.

It may be useful to mention certain cases which have been decided in different circumstances. In *Kimber* v. *The Gas*

(1) [1944] K. B. 750, 765.
(2) [1930] A. C. 404.
(3) [1930] 2 K. B. 183.
(4) [1929] A. C. 358.

Light & Coke Co. (1), there was no suggestion that the plaintiff was a trespasser, and Scrutton L.J. spoke of the duty of a person doing work on private premises to carry on his work with due precautions for the safety of those whom he knows or ought reasonably to know may be lawfully in the vicinity of his work. So in the case of *Brown* v. *Cotterill* (2), where a monumental mason was held liable for injuries to a child on whom fell a tombstone negligently fitted by the mason, the child was lawfully in the graveyard and Lawrence J., as Lord Oaksey then was, said: "These facts appear to me to "create a duty on the defendant to every member of the "public who may lawfully enter the churchyard and be "injured by the fall of the tombstone." So the injured plaintiff who recovered damages in *Haseldine* v. *Daw* (3), against the repairer of the lift was one lawfully on the premises. In that case Scott L.J. (4) said: "The facts of this case, therefore, "in my opinion, clearly show that the engineers did owe a "duty of care to any person using the lift in the ordinary way "up to the time of their next examination of it." Goddard L.J., as he then was, said (5): "It follows that where the "facts show that no intermediate inspection is practicable or "is contemplated, a repairer of a chattel stands in no different "position from that of a manufacturer and does owe a duty "to a person who, in the ordinary course, may be expected "to make use of the thing repaired." So also the plaintiffs in *Barnes and Another* v. *The Irwell Valley Water Board* (6), were lawfully on the premises. But would a duty to take reasonable care to supply pure and wholesome water not exist towards the wife of one who wrongly continued to occupy a house at the end of a lease? Or, if a person entered particular premises by mistake, and having taken the lift was injured in circumstances rendering a negligent repairer liable to persons entitled to use the lift, would the repairer be exempt from responsibility to the injured person? Or, would a companion of the appellant Donoghue who, in the café at Paisley, had without her permission picked up her tumbler and drunk out of it and become ill have been without remedy against the respondent Stevenson? In my judgment each of these questions and each set of facts would require separate examination, but liability such as that being considered in this case would not rigidly, automatically and inevitably be excluded merely because an injured person was one towards whom the occupier of the land would owe no greater duties than those very limited ones that he would owe towards a trespasser.

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(1) [1918] 1 K. B. 429.
(2) (1934) 51 T. L. R. 21.
(3) [1941] 2 K. B. 343.
(4) Ibid. 363.
(5) Ibid. 379.
(6) [1939] 1 K. B. 21.

If the matter had to be looked at on the assumption that it was the occupier of the land who was maintaining the overhead wires and had the responsibility for their positions, their height and their supervision, then on such basis, and on the facts as I have found them, but assuming no express invitation to a child to leave the footpath, there might nevertheless be liability for an accident. In *Liddle* v. *Yorkshire (North Riding) County Council* (1), where the Court of Appeal dealt fully with the law in regard to infant trespassers, Scrutton L.J. (2) referred to the decision of Holmes J. in a case in the Supreme Court of the United States. Scrutton L.J. said: " Mr. Justice " Holmes, whose views on English as well as on American " law are entitled to the most respectful consideration, has " said in *United Zinc and Chemical Co.* v. *van Britt* (3), 'Infants " ' have no greater right to go upon other people's land than " ' adults, and the mere fact that they are infants imposes " ' no duty upon landowners to expect them and to prepare " ' for their safety. On the other hand the duty of one who " ' invites another upon his land not to lead him into a trap " ' is well settled, and while it is very plain that temptation " ' is not invitation, it may be held that knowingly to establish " ' and expose, unfenced, to children of an age when they " ' follow a bait as mechanically as a fish, something that is " ' certain to attract them, has the legal effect of an invitation " ' to them although not to an adult. But the principle if " accepted must be very cautiously applied '." If, then, the position of an occupier of land who maintained overhead wires were being considered, there would arise the question whether there was the legal effect of an invitation to children in a case where a tree which is easy to climb is within 90 yards of a footpath. A fair way to test the argument now being considered is to assume that the defendants were the owners and occupiers of the field, and to assume that the deceased girl had no actual permission to leave the footpath or to be on any of the nearby fields. On that footing, with cautious approach it would have to be considered whether the exposing,

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(1) [1934] 2 K. B. 101.
(2) Ibid. 109.
(3) (1922) 258 U. S. 206, 275.

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Buckland v. Guildford Gas Light and Coke Co.

Morris J.

unfenced and unprotected, of a tempting, climbable tree did not have the legal effect of an invitation to a child. On the view of the case which I am expressing I am not called upon to decide this. It is sufficient to point out that even if it were thought that the defendants could not be in any different position than they would be in if they both maintained the wires and occupied the land under them, it does not by any means follow that on the latter hypothesis they might not be liable.

The defendants are, however, in a different position from the occupier of the land. They do not know, save to the extent that knowledge may come to them in the course of periodical inspections of their system, how much traversed the land may be. They do not know how much the occupier or members of his family or his friends use the land. They do not know the extent to which the occupier may give permission to people to be on the land. They have no control over any of these matters, and they cannot limit or restrict the number of those who, either with or without permission, may be on the land at the foot of the tree which is in question. If the occupier of the land invited people to go on to the land for some purpose and made a charge to them for admission, he might owe a higher duty to such persons than to others who came on the land as invitees. He would owe a lesser duty to licencees than he would owe to invitees. But the defendants would not be affected by these considerations. It would not appear to be reasonable if the duty owed by them depended for its existence upon, or varied in quality according as to the particular relationship (of which the defendants would be ignorant) existing between persons on the land and the occupier.

For the reasons which I have assigned I consider that the defenants, in the circumstances which existed, owed a duty to the deceased girl to take all reasonable steps to prevent the existence of a hidden peril. The defendants could so easily have taken various steps which would have avoided the grave risks of lurking, unseen danger. By breach of duty amounting to negligence they are, in my judgment, liable for the event which happened. I do not consider that contributory negligence on the part of the deceased girl is established. It was said that being a bright intelligent girl aged thirteen who was, as the evidence showed, competent to look after a younger child aged eight, she ought to have realized that she was approaching overhead wires. It was submitted that she could and should have seen that there were overhead wires and that they went towards the hedge where the tree was, and that accordingly she ought to have deduced when at the foot of the tree that the wires would be overhead and to have remembered the direction of approach. But a possible failure to recall the existence of the wires or a failure to make a correct deduction ought not, in the case of a girl of thirteen, to be held to be negligence. If she saw the wires and thought that she could climb up to them by going up the tree, in that event she might have regarded them as being telephone wires or some wires of a harmless character. There was no notice on or near the tree conveying a warning that concealed above the foliage there were wires which would kill at a touch. If, as seems more probable, she did not remember when she was under the tree that she had previously seen wires going towards the direction of the tree, this ought not to be imputed to her as negligence. Contributory negligence is not made out.

I need not recite the details of the evidence as to the attributes and prospects of the deceased girl. So far as the claim made for the benefit of her estate is concerned, I award the sum of 300*l.* She assisted her parents in the home and it was anticipated that her gifts would later have enabled her to contribute financially as well as by services to the household. The extent to which she could and would have done so must be considered with due regard to all the chances and changes that might have affected her and also her parents. Further, I must have in mind any benefit resulting from her estate. There will be nothing beyond the amount which I have just awarded. Taking this into account, so far as claims under the Fatal Accidents Act are concerned, I award 200*l.* The plaintiff is also entitled to the sum of 19*l.*, representing funeral expenses.

Judgment for the plaintiff.

Solicitor for the plaintiff: *J. R. Cort Bathurst.*
Solicitors for the defendants: *Blount, Petre & Co.*

1949
Jan. 13.

Lord Goddard C.J., Humphreys and Finnemore JJ.

RICHMOND RATING AUTHORITY AND SURREY COUNTY VALUATION COMMITTEE *v.* HAM RIVER GRIT CO., LD.

Rating and valuation—Industrial hereditament—Ballast and sand pits—Devaluation for industrial purposes—Excavations refilled by tipping rubbish—Amendment of valuation list in respect of excavated parts—"Tipping" not part of "industrial process"—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44) *s.* 4, *sub-ss.* 1, 2 (*a*) *—Factory and Workshop Act,* 1901 (1 *Edw.* 7, *c.* 22) *s.* 149, *sub-s.* 4.

A company were in occupation under a lease for years of a hereditament situated near Teddington lock, Surrey. The hereditament was used partly for the purpose of excavating ballast and sand, and partly for the purpose of tipping brick and other materials. It was shown that during the year 1947 the intake of material for tipping would greatly exceed the output of materials excavated, and by October of that year material was being tipped on a site from which at some date during 1946 materials had been excavated. To ensure that the excavations were not contaminated by tipped materials, a minimum space separating the face of the tip from the face of the excavation was maintained. At the material date (March 25, 1947) the main tipping and excavating faces were separated by a strip of water.

Held; that the tipping and excavating were two distinct processes and the net value of the hereditament must be shown as being apportioned between the occupation and use of the hereditament for industrial purposes and the occupation and use for other purposes.

CASE STATED by the Rating Appeals Committee of the Surrey quarter sessions under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

The appellants were the rating authority for the borough of Richmond and the County Valuation Committee for the county of Surrey (hereinafter referred to as the rating authority); the respondents were Ham River Grit Co., Ld. (hereinafter referred to as the company) and were the occupiers of a certain hereditament situated near Teddington lock, Surrey. The hereditament was used, by the company, partly for the purpose of excavating ballast and sand, and partly for the purpose of tipping brick and other materials, and was assessed for rating purposes in the current valuation list as follows:—

Total net annual value	*Industrial*	*Non-industrial*
4,120*l.*	2,950*l.*	1,170*l.*
Total rateable value	*Industrial*	*Non-industrial*
1,907*l.*	737*l.*	1,170*l.*

On March 25, 1947, the Rating Authority made a proposal to amend the list by increasing the net annual value from 4,120*l.* to 5,861*l.*, of which 3,896*l.* was apportioned as "industrial" and 1,965*l.* as "non-industrial." The company objected to the proposal, and on September 15, 1947 the assessment committee for the area, after hearing the objection, determined to amend the valuation list in the manner proposed. The company appealed to quarter sessions on the issue (in particular) whether the part of the net annual value of the hereditament attributable to the tipping of rubbish should be apportioned as "industrial" or "non-industrial" in accordance with the provisions of the Rating and Valuation (Apportionment) Act, 1928, s. 4. At the hearing of the appeal the facts proved or admitted were substantially as follows: The company had entered into occupation of the hereditament under a lease dated April 23, 1929. The hereditament in question was situated at the riverside near Teddington lock, Surrey. It was described in the valuation list for the borough of Richmond as "ballast and sand pits, buildings and premises, "land used for tipping and lock keeper's lodge." The hereditament was used by the company partly for the purpose of tipping brick and other material and partly for the purpose of excavating ballast and sand. The materials tipped exceeded the minerals exacavated, and by October 6, 1947, materials were being tipped on a site from which in the year 1946 minerals were exacavated. At the material date, March 25, 1947, the main tipping and excavating faces were separated by water. The rating authority contended (1.) that the land used for tipping should be treated as "non-industrial"; (2.) that the part used for excavating was physically divided from the part used for tipping; (3.) that the area of the hereditament used for the tipping of material was used for a purpose other than the process carried on in the hereditament as a factory and that such area was a separate and distinctive place; (4.) that the figures and facts relating to the use of the hereditament or its parts, subsequent to March 25, 1947, were irrelevant and inadmissible.

The company contended (1.) that the land used for tipping should be treated as "industrial"; (2.) that the excavating and tipping processes were complementary and constituted the normal unified working of a gravel pit; (3.) that there never was any place within the hereditament which was solely used for some purpose other than the process carried on in the hereditament as a factory; (4.) that it was necessary to look to the future as the same land would be used for both excavating and tipping as the face of the tip advanced. In para. 12 of the case the decision of the court of quarter sessions was stated—namely, that it accepted the contentions of the respondents and held that the hereditament was an industrial hereditament. The question for the opinion of the court was whether on the facts stated in the case the court of quarter sessions had come to a correct determination in law.

Erskine Simes K.C. and *Geoffrey Lawrence* for the rating authority. The question in this case is whether that part of the hereditament which is used for some purpose other than the manufacturing process for which the property was originally industrially derated ought to be rated on an increased valuation. The original process here was the quarrying of sand and gravel. Those portions from which materials had been removed became filled with water or were used for the tipping of refuse. They referred to the Factory and Workshop Act, 1901, and contended that s. 149, sub-s. 4 applied. It was material to consider the date of the proposal to amend the valuation, namely March 25, 1947, and the condition of the several portions of the hereditament on that date appearing from the plan provided. The facts show a physical separation on the date of the proposal to amend the valuation list. The quarter sessions came to a wrong conclusion. They referred to *Lewis* v. *Gilbertson & Co.* (1); *Cox* v. *S. Cutler & Son, Ld.* (2); *Barratt* v. *Gravesend Assessment Committee* (3).

Michael Rowe K.C. and *G. D. Squibb* for the company. It is common ground that this land is an industrial hereditament—a factory. Once it is shown that the property is used as a factory the whole is entitled to be derated. Here there is a pit which is being actually used for winning materials. The real point is whether this is a place within the meaning of s. 149, sub-s. 4, of the Factory and Workshop Act, 1901. It is impossible to say, that at any particular time, any part is a place for winning material or for tipping; it is a transient state.

[Lord Goddard C.J. How can a piece of land covered by water be called a quarry?]

The whole hereditament is one industrial hereditament;

(1) (1904) 68 J. P. 323.

(2) [1948] W. N. 345; 46 L. G. R. 517.

(3) [1941] 2 K. B. 107.

one is not confined to that part where excavation is still going on.

[LORD GODDARD C.J. Is not the date on which the proposal to amend the valuation list, namely, March 25, 1947, the date on which that question ought to be considered ?]

A rate is made from year to year ; at the beginning it was not possible to say that a certain part of the land was used for one purpose or another.

[LORD GODDARD C.J. The part which has been derated is diminishing during the whole year.]

The occupiers get the derating benefit for the work of winning gravel during the whole of the year.

LORD GODDARD C.J. This is a case stated by the rating appeals committee of Surrey quarter sessions under the Rating and Valuation Act, 1925, s. 31. The question was whether, a certain hereditament, near Teddington lock, Surrey, was or was not to be regarded as an industrial hereditament. The quarter sessions decided that the hereditament should be treated and assessed as an industrial hereditament. The question for this court is whether, upon the materials which were before it, that court, in so finding, came to a correct determination in law.

The question arises mainly on the true construction of a section in the Factory and Workshop Act, 1901. I shall, first of all, refer to the Rating and Valuation (Apportionment) Act, 1928, because that is the Act which was passed for the apportionment between that part of the hereditament which is industrial and the part which is non-industrial, so that the industrial part of the hereditament gets what is commonly called the advantage of derating, while the non-industrial portion does not get that advantage.

The Rating and Valuation (Apportionment) Act, 1928, s. 4, sub-ss. 1, 2 (*a*), provides that " in every valuation list every " industrial hereditament occupied and used wholly for " industrial purposes shall be shown as being so occupied and " used, and as respects every such hereditament occupied and " used partly for industrial purposes, the net annual value " thereof shall be shown, in the prescribed manner, as being " apportioned between the occupation and user of the heredita- " ment for industrial purposes, and the occupation and user " thereof for other purposes. (2.) For the purpose of deter- " mining in what proportions an industrial hereditament is

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"occupied and used for industrial purposes and for other "purposes respectively, the following provisions shall have "effect: (*a*) The hereditament shall be deemed to be occupied "and used for industrial purposes except in so far as any part "thereof is, under this Act or under the enactments relating "to the regulation of mines, factories and workshops, to be "deemed neither to be, nor to form part of, a mine, factory or "workshop."

Therefore, under that Act, the task is to find whether any part of the hereditament which prima facie is an industrial hereditament forms no part of a mine, factory or workshop. To discover what principles to apply to determine that question, we have to consider the Factory and Workshop Act of 1901. Under sch. VI. to that Act, among the places which are to be deemed to be factories are "'quarries' that is to "say, any place, not being a mine, in which persons work in "getting slate, stone, coprolites or other minerals." This area is for that purpose a quarry. The Factory and Workshop Act, 1901, s. 149, sub-s. 4, provides that "where a place "situate within the close, curtilage or precincts forming a "factory or workshop is solely used for some purpose other "than the manufacturing process or handicrafts carried on in "the factory or workshop, that place shall not be deemed to "form part of the factory or workshop for the purposes of "this Act, but shall, if otherwise it would be a factory or "workshop, be deemed to be a separate factory or workshop "and be regulated accordingly."

That shows that the test is whether there is a place used for some purpose other than the manufacturing process. For this purpose we may use the words "quarrying process carried on" and for the word "factory" we can say "quarry." There is no difficulty here in determining that the tip is a place and a place separate from the quarry in the sense that no part of the quarrying is carried on where the process of tipping is carried on. No one suggests that the process of tipping is a manufacturing process or a quarrying process; it is no part of the quarrymen's work to tip rubbish into the excavated land, though it may be a convenient and profitable thing to allow other people to tip into it and pay a consideration for being so allowed.

When the case was before quarter sessions it was agreed between the parties to the appeal that the hereditament was an "industrial" hereditament within the meaning of the

Rating and Valuation (Apportionment) Act, 1928 and that the issue between the parties was whether the part of the net annual value of the hereditament attributable to the tipping of material should be apportioned as "industrial" or "non-"industrial" in accordance with the provisions of s. 4 of the Act. The Rating Appeals Committee did not apply their minds to the point which counsel for the company maintains and to which I think counsel for the Rating Authority agrees was the real point which ought to have been decided. They decided that the tipping was part of the quarrying operation, a finding counsel for the company did not now seek to support. The company can uphold the decision of quarter sessions on any ground which is open to them, and they seek to uphold the decision on the ground that the tip was not a place within the meaning of the section of the Factory and Workshop Act to which I have just referred. I cannot take that view. I think it is obvious in this case that there is no difficulty in saying which part of this hereditament was being used as a tip and which part of this hereditament was being used as a quarry, and indeed, our attention has been called to valuations which have been made by the valuers, and apparently agreed. I do not understand that there is any question here about figures at all, and there does not seem to have been any difficulty in the valuers saying the value of the tip is so much and the value of the part used as a quarry is so much or apportioning it between the two in the way in which the Act provides.

Counsel for the company in the course of a forcible argument, suggested that one reason which prevents the court holding that the tip is a place is because it is a shifting place in the sense that as they tip, the space, into which they tip gets gradually smaller or gets gradually nearer to the face of the quarry where the quarrying is being done. If the cubic content that is tipped greatly exceeds the cubic content that is being quarried, no doubt at some time or other the tipping face, if that is the right expression, will get very near the working face. The material question is what was the position of things on March 25, when the proposal was made. At that date there was no difficulty, and that is clearly shown by the agreement of the valuers in this matter, in ascertaining the difference between the two places, and I see no reason, therefore, why the tipping face should not be regarded as a place. I think that would be in accordance with the decision of this court in the case of *Lewis* v. *Gilbertson & Co.* (1). I think it is defined and ascertainable as it was in that case. In that case it was a question whether a hereditament was used as a factory. A new sheet mill was going to be constructed and the accident took place on that part of the hereditament where the new mill was to be constructed and the machinery which was there being used was not fenced. It was within the curtilage of the old original factory. The court held that it came within the words of the section I have read because it was an ascertainable place and, therefore, there was not an obligation on the occupiers to fence because it was outside the factory. That case was approved by the Court of Appeal in *Cox* v. *S. Cutler & Sons, Ltd.* (2) and in my opinion this case is covered by those two cases.

Accordingly in my opinion the question submitted to this court must be answered in the negative. The Appeals Committee came to a wrong decision in point of law and this appeal must be allowed.

HUMPHREYS J. I am of the same opinion. I am inclined to think that the Rating Appeals Committee of quarter sessions were right in thinking that the only ground upon which they could allow the appeal was that which they stated. That was that the hereditament should be treated as occupied and used wholly for industrial purposes because the excavating and filling in of the excavations formed one process. If that were correct, I think it would have been right for the Appeals Committee to have allowed the appeal, but in fact there is no evidence of that. The evidence is all the other way. It is quite clear it is not one process. When the case came before this court that matter was abandoned by the company who agreed that the decision of the Appeals Committee could not be supported on that ground.

Counsel for the company then argued that it was impossible from a rating point of view to say that there was any land here which could be allocated to the non-industrial part of the hereditament, but the answer to that is that which my Lord has referred to, where the court was told that the issue between the parties was whether the part of the net annual value of the hereditament attributable to the tipping of the material should be treated as worth so much, and the figure is given, or whether the whole hereditament should be treated as industrial, and, therefore, deratable.

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(1) 68 J. P. 323.

(2) [1948] W. N. 345, 46 L. G. R. 517.

There is no real difficulty in the law in this case because the statute seems to me to be tolerably plain. The Rating and Valuation (Apportionment) Act, 1928, in effect states first of all that where the hereditament is mainly used for, if I may use the expression, deratable purposes, industrial purposes, then it shall be deemed to be occupied for that purpose "except "in so far as any part thereof is, under this Act or under the "enactments relating to the regulation of mines, factories "and workshops, to be deemed neither to be, nor to form part "of, a mine, factory, or workshop." That takes us to the Factory and Workshop Act, 1901, and the definition is that a place situated within the precincts forming a factory which is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory, is to be deemed not to form part of the factory. That leaves the simple question, which seems to me to be much more a question of fact than a question of law, whether this particular process of tipping was a process for which some part of this otherwise industrial hereditament was used. It is of course common ground that the tipping of material is no part of the process of winning gravel or sand and the evidence is conclusive here that they are two quite separate processes. The fact that they are carried on at different times upon the same ground raises no difficulty at all. I think the case is tolerably clear, and I agree with the result proposed by my Lord.

FINNEMORE J. I agree that this appeal should be allowed and for the reasons which have already been given. I do not think there is anything I wish to add to the judgments which have already been pronounced by the court.

Appeal allowed.

Solicitors for the appellants: *Wyatt & Co., for Dudley Aukland, Kingston-on-Thames.*

Solicitors for the respondents: *William Charles Crocker.*

L. F. J. McD.

C. A.

1948

Nov. 15, 16;
Dec. 3.

Bucknill and Denning L.JJ. and Jenkins J.

METROPOLITAN BOROUGH OF BATTERSEA *v.* THE BRITISH IRON AND STEEL RESEARCH ASSOCIATION.

BRITISH LAUNDERERS' RESEARCH ASSOCIATION *v.* BOROUGH OF HENDON RATING AUTHORITY.

Rates and rating—Exemption—Hereditament belonging to society—"Instituted for purposes of science, literature, or the fine arts "exclusively"—Purposes of science and those incidental to such purposes, or collateral purposes—Constitution of society best evidence of purposes—Society supported wholly or in part by annual voluntary contributions—Meaning of "voluntary"—Government grant not a voluntary contribution—Scientific Societies Act, 1843 (6 *&* 7 *Vict., c.* 36), *s.* 1.

The word "exclusively" in the phrase "society instituted for "purposes of science, literature or the fine arts exclusively" in s. 1 of the Scientific Societies Act, 1843, must be given its full effect. It is not sufficient to secure exemption from rateability that a society should be instituted mainly, primarily or chiefly for purposes of science, architecture or the fine arts—the test put forward in *Reg.* v. *Institution of Civil Engineers* (1879) 5 Q. B. D. 48.

Reg. v. *Cockburn* (1852) 16 Q. B. 480 approved.

If a society be instituted for the promotion of science, literature or the fine arts, then, although its authorized activities include activities which, considered as ends in themselves, would be ends other than the purposes of science, literature or the fine arts, nevertheless, if those activities are, in fact, only a means of obtaining the purposes of science, literature, or the fine arts, the society is not deprived of the exemption. There is a clear distinction between clauses conferring powers of a general nature which any company will need in order to conduct its affairs and object clauses directed to defining the particular range of affairs in which the company proposes to engage. But if a society is instituted for a purpose which is not a purpose of science, literature or the fine arts or incidental to such purposes, but is collateral, the society loses its exemption from rateability, whether such collateral purpose is main or subsidiary, or whether it exists jointly with or separately from the purposes of science, literature or the fine arts. See the opinions of Lord Watson and Lord Macnaghten in *Commissioner of Inland Revenue* v. *Forrest* (1890) 15 App. Cas. at pp. 348 and 354.

The word "science" in the section includes pure or abstract science, such as pure mathematics and also the applied sciences, such as electricity or engineering; but the purposes of science do not include the purposes of firms or persons who make use of science.

Where there is a document or documents containing the constitution of a society such as a memorandum and articles of association, it or they are the best evidence of the purposes for which a society is instituted. But if there is no such document or documents or it or they are not clear on the point, then regard may be had to the purposes which a society has in fact pursued, since, if it has in fact pursued alien purposes, the society cannot claim the exemption. *Purvis* v. *Traill* (1849) 3 Exch. at p. 350, per Parke B. A society cannot get exemption from rateability by pleading that what they are doing is ultra vires.

Applying these principles, the Court of Appeal held that the research associations in these two cases: (the British Iron and Steel Association having regard only to their memorandum of association (cl. 3, sub-cll. *c*, *d* and *g* (*q. v.*), sub-cl. *g* giving the association power to acquire patents or licences relating to any inventions which might seem capable of being used by members of the association for any of the purposes of the iron or steel industries; and the British Launderers' Research Association, having regard to their memorandum of association and also to the purposes which they had in fact pursued), were instituted not only for the purposes of science but also for collateral purposes. Neither sets of purposes were incidental to the other, but each was collateral to the other and accordingly these two societies were not exempt from rateability.

A society, coming within the terms of the section, can only claim exemption from rateability, if it shall be supported wholly or in part by annual voluntary contributions. That means that the society must be supported wholly or to something more than a merely nominal part (such as 2 per cent. of its total income) by voluntary contributions. There must be members of the public prepared to put their hands in their pockets to support the society from motives of public spirit as opposed to private gain, but a subscription is not prevented from being a voluntary contribution merely because it carries with it membership of the society and certain incidental advantages are conferred by membership. The substance of each case must be regarded to see whether the payments claimed to be voluntary contributions are made substantially as a matter of business or as a matter of bounty. The ordinary subscription of a member to a society which affords him important business advantages is not a voluntary contribution, within the meaning of the section. Neither is a contribution to the society by a federation to which the members of the society normally belong and from which the members of the society are required, by the use of their best endeavours, to procure such contribution.

A government grant to a society, being a grant of public funds, at the expense of the general body of taxpayers, is not a voluntary contribution within the meaning of the section.

The income of the Iron and Steel Research Association for a given period was 99,474*l.* 12*s.* 5*d.*, of which 91,700*l.* was made up of subscriptions and contributions in support of general funds; being 60,000*l.* received from the British Iron and Steel Federation; a voluntary contribution of 2,000*l.* from an associate member and a

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government grant of 29,700*l.* The federation was not a member of the association. There was no obligation on the federation to make their payment and there was no method of enforcing that payment. Members of the association were required to be members of the federation or of an association affiliated thereto except by special dispensation of the council and the members of the association engaged to use their best endeavours to procure the federation to pay this contribution. The income of the British Launderers' Research Association received in 1946 was a grant from the Committee of the Privy Council for Scientific and Industrial Research of 8,500*l.*; students fees, 1,702*l.*, and technical advice fees, 359*l.* 17*s.* 7*d.*

Held that neither association was supported wholly or in part by annual voluntary contributions.

The Mayor, etc., of Liverpool v. *West Derby Union* (1905) 69 J. P. 277; 3 L. G. R. 647 approved.

Hornsey School of Art v. *Edmonton Union* (1905) 70 J. P. 121; 4 L. G. R. 178 and *Westminster City Council* v. *Royal United Service Institution* [1938] 2 All E. R. 545, where it was held that a government grant was an annual voluntary contribution within the meaning of s. 1, disapproved on that issue.

British Non-Ferrous Metals Research Association v. *Borough of St. Pancras* (1932) 16 R. and I. T. Cases 136, overruled on both grounds: that as to purposes of science and that as to a government grant being an annual voluntary contribution.

Per DENNING L.J. (on the issue of what is a question of fact). Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as an original document. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If, and in so far as, those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact; and the only questions of law which can arise on them are whether there was a proper direction in point of law; and whether the conclusion is one which could reasonably be drawn from the primary facts: see *Bracegirdle* v. *Oxley* [1947] K. B. 349. If, and in so far, however, as, the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a trained lawyer, as for instance because it involves the interpretation of documents, or because the law and the facts cannot be separated, or because the law on the point cannot be understood or applied properly except by a trained lawyer, the conclusion is a conclusion of law, on which an appellate tribunal is as competent to form an opinion as the tribunal of first instance.

APPEAL from a judgment of the Divisional Court.

The association was incorporated on June 27, 1944, under the Companies Act, 1929, as a company limited by guarantee, dispensing with the addition of the word "limited" to its name under a licence granted by the Board of Trade pursuant to s. 18 of that Act.

The association were rated as occupiers of "laboratories "and appurtenances, 140, Battersea Park Road," in the sum of 525*l*. gross value and 350*l*. rateable value by a general rate for the relief of the poor and for other purposes chargeable thereon on March 26, 1947, to come into effect on April 1, 1947. The association appealed to the London quarter sessions on the ground that the association were improperly inserted in the rate in respect of this property as occupiers, since they were an association instituted for purposes of science exclusively supported wholly or in part by annual voluntary contributions, forbidden by its memorandum and articles of association from making any dividend, gift or bonus in money to its members and duly certified to be entitled to the benefit of the Scientific Societies Act, 1843 (1), and the property was occupied by the association for the transaction of its business and for carrying into effect its purposes.

The London quarter sessions allowed the appeal on the ground put forward by the association and amended the rate, but at the request of the rating authority stated the following case for the decision of the Divisional Court.

The association was in occupation of the first and ground floors of No. 140, Battersea Park Road, being the laboratories and appurtenances aforesaid. The problems of research dealt with by the association were of general scientific interest covering the whole field of iron and steel production and processing. There were three departments of this scientific research, namely, chemistry, physics and engineering. This hereditament was used by the physics department and the

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(1) By s. 1 of the Scientific Societies Act, 1843: "No person ". . . . shall be assessed or rated ". . . . or liable to pay . . . . rates ". . . . in respect of any land, "houses, or buildings . . . . belonging to any society instituted for "purposes of science, literature "or the fine arts, exclusively ". . . . and occupied by it for the "transaction of its business, and "for carrying into effect its "purposes, provided that such "society shall be supported wholly "or in part by annual voluntary "contributions and shall not, and "by its laws may not make any "dividend, gift, division or bonus "in money unto or between any "of its members and provided "also that such society shall "obtain the certificate of the "barrister at law or lord advocate, "as herein-after mentioned."

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work carried on there was exclusively scientific. The income and expenditure account of the association for the period June 27, 1944, to December 31, 1945, was 99,474*l.* 12*s.* 5*d.*, of which 91,700*l.* was made up of subscriptions and contributions in support of general funds, being firstly 60,000*l.* received from the British Iron and Steel Federation. The federation was not a member of the association. There was no obligation on the federation to make the said payment and there was no method of enforcing payment. Secondly, an associate member voluntarily contributed 2,000*l.* in support of the general funds. Thirdly, there was a government grant of 29,700*l.* The association had obtained a certificate in accordance with the Scientific Societies Act, 1843.

The association had taken out three patents in relation to improved methods for employing iron and steel, in order to give the association a control over the use of the patents, and to ensure that the standard of processes and finished articles was maintained at a high level. No licences were granted for their use and no income had resulted.

By para. 3 of their memorandum of association, which was annexed to the case stated, the objects for which the association was established, were:

(*a*) To promote and facilitate in every possible way research and other scientific work in connexion with the iron and steel trade or industry and other trades and industries allied therewith or accessory thereto and raw materials, including fuel and refractories, used in the said trades or industries.

(*b*) To establish, form, equip and maintain laboratories, workshops, factories and any other buildings or stationary or mobile plant for the purposes of research, development and other scientific work in connexion with the said trades or industries.

(*c*) To carry on and conduct or assist in carrying out or conducting all kinds of experiments and all kinds of technical work, and the designing, building and development of plant, machinery and processes in connexion with the said trades or industries.

(*d*) To provide funds for any of the purposes herein specified and for payment to any person or persons, body or corporation engaged in any such work and to encourage and improve the technical education of persons who are likely to be engaged in the said trades or industries or work, and for that purpose to set up, organize and finance research committees.

(*e*) To prepare, edit, print, publish, issue, acquire and circulate books, papers, periodicals, gazettes, circulars and other literary undertakings treating of or bearing upon the said trades or industries or any of them and to establish, form and maintain museums, collections, libraries and collections of literature, statistics, scientific data and other information relating to the said trades or industries or any of them or to matters of interest to the members thereof and to translate, compile, collect, publish, lend and sell, and endeavour to secure or contribute to, the translation, compilation, collection and publication, by Parliament, government departments, and other bodies or persons, of any such literature, statistics and information, and to disseminate the same by means of the reading of papers, delivery of lectures, giving of advice, the appointment of advisory officers or otherwise.

(*f*) To retain or employ skilled, professional or technical advisers or workers in connexion with the objects of the association, and to pay therefor such fees or remuneration as may be thought expedient, also to found, aid, maintain and endow scholarships and bursaries for the remuneration, instruction and support of students in research work or persons engaged in studying the principles involved in any of the said trades or industries or connected therewith, whether in laboratories of the association or elsewhere, and to employ and remunerate, as may be expedient, instructors and supervisors for such students and also for persons engaged in studying the principles involved in any of the said trades or industries or connexions therewith, paying due regard to the provision of instruction by existing instructions.

(*g*) To encourage the discovery of and investigate and make known the nature and merits of inventions, improvements, processes, materials and designs which may seem capable of being used by members of the association for any of the purposes of the said trades or industries or any of them and to acquire any patents or licences relating to any such inventions, improvements or processes and to acquire and register any designs or standardization marks, whether for general or special purposes, with a view to the use thereof by members of the association and others upon such terms as may seem expedient, and to develop, perfect and test the value of such inventions, improvements, processes

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and designs by manufacturing, exhibiting and placing on the market any articles or substances to which the same may be capable of application.

(*h*) To apply to the government, public bodies, urban, local, municipal, county and other bodies, corporations, companies or persons for and to accept grants of money and (subject to s. 14 of the Companies Act, 1929) of land, donations, gifts, subscriptions and other assistance with a view to promoting the objects of the association, and to discuss and negotiate with the committee of the Privy Council for Scientific and Industrial Research and other government departments, public and other bodies, corporations, companies or persons, schemes of research and other work and matters within the objects of the association and to conform to any proper conditions upon which such grants and other payments may be made.

(*i*) To establish, promote, co-operate with, become a member of, act as, or appoint trustees, agents or delegates for, control, manage, superintend, afford financial assistance to, or otherwise assist the research work of any associations and institutions and other bodies incorporated or not incorporated, whose objects include scientific or industrial research.

(*j*) To establish, maintain, control, and manage branches of the association in the United Kingdom and elsewhere as may seem expedient, and from time to time to determine the constitution, rights, privileges, obligations and duties of such branches, and, when thought fit, to dissolve and modify the same.

(*k*) To undertake and execute any trusts which may be conducive to any of the objects of the association.

(*l*) To carry out any of the above-mentioned research or other scientific work and to do all or any of the above-mentioned things whether affecting the whole of the said trades or industries or merely one or more particular parts or sections of the said trades or industries or any of them, or the business of any particular member or group of members of the association, and in the case of work not affecting the whole of the said trades or industries, to make such arrangements as to special payment by such particular sections or members or groups of members as may be expedient.

(*m*) To borrow or raise any money that may be required by the association upon such terms as may be deemed advisable and in particular by the issue of bonds, debentures, bills of exchange, promissory notes or other obligations or securities of the association, or by mortgage or charge of all or any part of the property of the association.

(*n*) To draw, make, accept, indorse, discount, execute and issue promissory notes, bills of exchange and other negotiable or transferable instruments.

(*o*) To invest the moneys of the association not immediately required, in any one or more of the modes of investment for the time being authorized by law for the investment of trust moneys and in such manner as may from time to time be determined.

(*p*) Subject to the provisions of the fourteenth section of the Companies Act, 1929, to purchase, take on lease or in exchange, hire or otherwise acquire any real and personal property, and in particular any land, buildings, workshops, factories, laboratories, machinery, plants, apparatus, appliances and any rights or privileges necessary or convenient for the purposes of the association, and to construct, erect, alter, improve and maintain any buildings which may be from time to time required for the purposes of the association, and to manage, develop, sell, demise, let, mortgage, dispose of, turn to account or otherwise deal with all or part of the same, with a view to the promotion of the objects of the association.

(*q*) To pay all expenses, preliminary or incidental to the formation of the association and its registration.

(*r*) To use the funds of the association in the employment of persons of learning or skill, and the provision and use of buildings and of instruments, materials, plant, machines and appliances, and of any of the equipment of the association for any form of scientific studies which may be considered to have some bearing whether immediate or ultimate, on practical problems involved in the nature, manufacture or production or use of iron and steel or which may be considered conducive to the furtherance of the objects of the association.

(*s*) To collect, arrange, index and publish information as to materials, patents, processes, machines, plant, appliances and tools used or known in or in regard to the production or use of iron and steel or the said trades or industries or likely to be useful thereto, and to establish and maintain a bureau of information for the benefit of members of the association.

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(*t*) To establish and support or aid in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the association or the dependants or connexions of such persons, and to grant pensions and allowances to and to make payments towards insurance of such persons.

(*u*) To procure the association to be registered or recognized in any part of the British Empire or in any foreign country or place.

(*v*) To do all such other lawful things as may be incidental to or conducive to the attainment of the above objects.

The second proviso to cl. 4 of the memorandum of association which was the clause prohibiting any distribution by way of profit amongst the members required under s. 18 of the Companies Act, 1929 (now s. 19 of the Companies Act, 1948) and also meeting the corresponding requirement of s. 1 of the Scientific Societies Act, 1843, was in these terms : " Provided also that " nothing herein shall prevent any member of the association, " whether a member of the council or not, from exercising any " processes and making, using, acquiring and vending any " articles and things in the ordinary course of his business for " profit or otherwise under any licence or permission in respect " of any discovery, invention and patents resulting from the " work of the association."

The articles of association included the following provisions with respect to membership and subscriptions : " the council " being the council of management of the association and " the " federation," being the British Iron and Steel Federation : " 5. The membership of the association shall consist of persons " and corporate bodies with the following qualifications : " (*a*) ordinary members who shall be signatories of the " memorandum of association and those British subjects carrying on business in the production and marketing of or in the " production of machinery, appliances, accessories and " materials, whether raw or not, to be employed in the " production, marketing or use of iron and steel, and those " British corporations carrying on business as aforesaid who " shall be elected as ordinary members of the association in " manner hereinafter provided, and all (except with the special " waiver of the council of this stipulation) being members of " the federation or of an association affiliated thereto. " (*b*) Associate members who must be persons, corporations, " or representatives of firms or unincorporated bodies connected "with or interested in any way in the trades or industries "referred to in the memorandum of association or any of "them, and likely to assist in the development of the said "trades or industries, or any of them, or persons, corporations, "or representatives of firms, unincorporated bodies dealing in "requisites used in any way in or produced by the said trades "or industries. Provided that the question whether any "such person, corporation, firm or unincorporated body shall be "regarded as coming within the categories above mentioned "shall be decided by the council alone. The council's decision "shall be final, and the council shall not be obliged to give "any reasons for its decision. (*c*) Nominate members being "persons whether entitled or not to become members under "the above provisions and nominated for membership by the "council for special services or for special causes. 19. Every "member of the association shall be bound: (*a*) To pay such "entrance fee and such annual subscription as shall from time "to time be fixed by the council. Provided that: (i.) the "federation shall within fifteen days of written request by the "association pay to the association or procure the British "Iron and Steel Corporation Ld. to pay to the association "(and the members of the federation shall by becoming "members of this association be deemed to have agreed to use "their best endeavours to procure such payment to the "associaton) all such sums as shall from time to time be "declared by resolution of the council of the association as "necessary to enable it to carry out its objects. Provided "that the federation shall not be called upon to pay to the "association sums exceeding in the aggregate 250,000*l.* in "any one year without its prior written consent being first "had and obtained."

The Divisional Court upheld the decision of quarter sessions and the borough council, the rating authority, appealed.

Harold B. Williams K.C. and *Percy Lamb* for the rating authority. To secure exemption from assessment and rating under s. 1 of the Scientific Societies Act, 1843, the association must show that it is a society instituted for purpose of science exclusively. The Divisional Court were bound by their own decision in *British Non-Ferrous Metals Research Association* v. *Borough of St. Pancras* (1), a case closely resembling the present in its essential features. Here the rating authority are free to

(1) (1932) 16 R. and I. T. Cas. 136.

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contend that that decision and the decision in this case before the Divisional Court were wrong. In *Reg.* v. *Cockburn* (1) Lord Campbell C.J. said (2), dealing with this section : " Pur-" poses of science are undoubtedly comprised within the scope " of the institution thus described and explained ; but are the " purposes so described and explained *exclusively* scientific ? " We are bound to look at all the purposes for which the " society is professedly founded, and to which, without a " breach of trust, its funds may be applied." In *Reg.* v. *The Institution of Civil Engineers* (3) the court described the questions for determination to be whether the advancement and acquisition of science taken generally was the main and substantial object of the association. If so, they said, then the necessary concomitant advantage and enjoyment to the individual did not destroy the exception. The court came to the conclusion that in the case of the institution the advantage and enjoyment conferred upon the individual was not merely concomitant, but was the primary or at any rate a distinct object and so held that the institution was not exempt from rateability, but *In re Matter of Duty on the Estate of the Institution of Civil Engineers* (4) the Court of Appeal held, by a majority, that the institution was subject to an exemption contained in s. 11 of the Customs and Inland Revenue Act, 1885, in favour of property which, or the income or the profits whereof, shall be legally appropriated or applied " for the " promotion of education, literature, science, or the fine arts." That section did not contain the word "exclusively." In *Commissioners of Inland Revenue* v. *Forrest* (5) the House of Lords affirmed this decision with regard to the institution under s. 11 of the Act of 1885. In that case Lord Watson said (6), dealing with s. 1 of the Act of 1843 : " It is not " sufficient compliance with the plain language of the Act " that a society be established chiefly for the purpose of " promoting science, literature, or the fine arts. One or other " of these must be its exclusive object ; so that an institution " which also contemplated some other, though altogether " subsidiary object, could not claim the benefit of the " exemption." Lord Macnaghten said (7) that while he agreed with the conclusion in the case of *Reg.* v. *Institution of Civil Engineers* (3) he had some difficulty in accepting the

(1) (1852) 16 Q. B. 480.
(2) Ibid. 490.
(3) (1879) 5 Q. B. D. 480.
(4) (1888) 20 Q. B. D. 621.
(5) (1890) 15 App. Cas. 334.
(6) Ibid. 348.
(7) Ibid. 353.

propositions and following the reasoning on which the conclusion was based. This then establishes the position that for the exemption to apply the society must be instituted for the purposes of science exclusively. In *Jenner Institute of Preventive Medicine* v. *St. George's Union* (1), Grantham J. and Channell J. held that one of the society's objects and probably the main was to dispense to the public and to individuals the benefits of science and so the society was not within the exemption. See also the *Royal College of Music* v. *St. Margaret's Vestry* (2), where Hawkins J. said that the effect of *Inland Revenue Commissioners* v. *Forrest* (3) was virtually to overrule the judgments of Field and Manisty JJ. in *Reg.* v. *Institution of Civil Engineers* (4). In *The Institution of Civil Engineers* v. *Commissioners of Inland Revenue* (5) which decided that the institution was a body of persons established for charitable purposes only and so exempt from income tax under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, all the judges, Lord Hanworth M.R., Lawrence L.J. and Romer L.J. pointed out that the reasoning in *Reg.* v. *The Institution of Civil Engineers* (4) was inconsistent with the speeches of Lord Watson and Lord Macnaghten in *Inland Revenue Commissioners* v. *Forrest* (6).

[DENNING L.J. If the society was instituted for a purpose collateral to science though it might be subordinate, the society was not instituted for purposes of science exclusively.]

That is so: the cases have now established that the word exclusively in s. 1 of that Act of 1843 has its natural meaning and the principle applicable is that stated in the case first cited: *Reg.* v. *Cockburn* (7). The purposes must be exclusively scientific, and regard must be had to all the purposes for which the society is professedly founded. See also *School of Oriental and African Studies* v. *Westminster City Rating Authority* (8). In *British Launderers' Research Association* v. *Borough of Hendon Rating Authority* (9), which is about to be heard on appeal, the Divisional Court held that the association in that case was not instituted for the purposes of science exclusively.

(1) (1900) 69 L. J. (Q. B.) 814; Ryde & Konstam's Rating Appeals, 1894–1904, at p. 242.
(2) [1898] 1 Q. B. 304; (C. A.) 809.
(3) 15 App. Cas. 334.
(4) 5 Q. B. D. 48.
(5) [1932] 1 K. B. 149.
(6) 15 App. Cas. 353.
(7) 16 Q. B. 480.
(8) [1940] 2 All E. R. 537.
(9) (1948) 112 J. P. 183.

As to the application of s. 1 of the Scientific Societies Act, 1843, the court must look at the whole range of the purposes for which the society is instituted, i.e., in this case it must look at the memorandum and articles of association. The question is: are the purposes there disclosed exclusively scientific? The actual activities of the society are in the first place irrelevant: see the observations of Parke B. in *Purvis* v. *Traill* (1). If there is found in the memorandum power to engage in activities as a means to or for the fulfilment of a scientific purpose, that will not destroy the exemption, but, if there is disclosed a purpose or object which is not scientific but is collateral to the scientific purpose or purposes, that will destroy the exemption.

There are purposes here disclosed in the memorandum of association which are not scientific and not a means to purposes that are scientific: See cl. 3 of the memorandum of association, sub-clauses (*c*), (*d*), (*g*), (*s*) and the second proviso to cl. 4 of the memorandum. Sub-clauses (*e*) and (*f*) are ancillary to whatever is the purpose of the association whether that purpose is scientific or commercial. Sub-clause (*g*) would enable the association to acquire a patent and make it available on terms of payment to persons not even members of the association. The powers of cl. 3 would enable the association if a member wanted a special report to make him pay for it. In *Royal College of Music* v. *St. Margaret's Vestry* (2) the purpose of the teaching was for the sake of music, a fine art. Here (see sub-clauses (*e*) and (*f*)) the teaching was for the purpose of obtaining commercial appointments.

The total income of the association from June, 1944 to December 31, 1945, was 99,474*l.* 12*s.* 5*d.*, of which 91,700*l.* was made up of subscriptions and contributions in support of general funds, being 60,000*l.* received from the British Iron and Steel Federation; 2,000*l.* contributed by an associate member, and a government grant of 29,700*l.* To obtain the exemption, the association must be supported wholly or in part by annual voluntary contributions. With the exception of the 2,000*l.* which is so small a proportion of the total that it must be disregarded, none of these contributions were voluntary The members of the association who normally must all be members of the federation or of an association affiliated thereto, are, by virtue of the articles of association, to use their best endeavours to procure the federation to pay this contribution. The subscriptions of members themselves are paid with the result that important business advantages accrue to them. Further a government grant is not a voluntary contribution. It is submitted that the decision in *Hornsey School of Art* v. *Edmonton Union* (1) is wrong since it was there held that contributions paid out of rates by the local education authority and grants paid by the Board of Education out of moneys provided by Parliament to the school of art were voluntary contributions within the meaning of s. 1. And so was the decision in *Westminster City Council* v. *Royal United Service Institution* (2) following the *Hornsey* case (1) and that in *British Non-Ferrous Metals Research Association* v. *Borough of St. Pancras* (3). The government grant in that case was given on conditions, so that it cannot be voluntary. In *Overseers of the Savoy* v. *Art Union of London* (4) Lord Macnaghten said (5): that the words annual voluntary contributions "met the "eye not infrequently on the walls of schools and hospitals; "it is to be found in the forefront of many charitable appeals. "So used it carries with it a meaning which nobody can "mistake. It means that the institution on whose behalf the "statement is put forward depends for its support on freewill "offerings—on the generosity of persons acting from disinterested motives and not looking for any return in the shape "of direct personal advantage." See also the speech of Lord Shand (6).

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(1) (1849) 3 Exch. 350.

(2) [1898] 1 Q. B. 304; (C. A.) 809.

Michael Rowe K.C. and *W. L. Roots* for the association. To secure the exemption, the association must show that it was instituted for the purposes of science exclusively. What is meant by "science"? That word is not limited to pure or speculative science but it includes applied science. See the observations of Lord Macnaghten in *Commissioners of Inland Revenue* v. *Forrest* (7). To determine whether a society is instituted for purposes of science exclusively the court is not limited to a consideration of the purposes set out in the document of incorporation of grant or the charter, but it may consider any other factors which throw light on the intention of the founders. There is, it is submitted, no conflict of principle in this case; each purpose has to be considered to see whether

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(1) (1905) 70 J. P. 121; 4 L. G. R. 178.
(2) [1938] 2 All E. R. 545.
(3) 16 R. and I. T. Cas. 136.
(4) [1896] A. C. 296.
(5) Ibid. 312.
(6) Ibid. 313–4.
(7) 15 App. Cas. 353–4.

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it is a collateral purpose or one merely incidental to a scientific purpose. If the purpose is merely incidental to the scientific purpose, that does not defeat the exemption. A. L. Smith L.J. put the issue thus in *Art Union of London* v. *Overseers of Savoy* (1): "If the other object be an object distinct from "and not connected with the fine arts, then the society even "though that object be altogether subsidiary, has not as its "exclusive object the promotion of the fine arts, but, if the "other object be only a means to the one end, i.e., as in this "case, a lottery, whereby to draw money from the public for "the promotion of the fine arts, then the society has a sole "and exclusive object, and not another object subsidiary "thereto." A. L. Smith L.J. dissented from the decision of the Court of Appeal in that case on the issue of what were voluntary contributions; but his view was upheld in the House of Lords (2). That is the way in which A. L. Smith L.J. interpreted the decision in *Commissioners of Inland Revenue* v. *Forrest* (3). In *Institution of Civil Engineers* v. *Commissioners of Inland Revenue* (4) the issue was whether the institution was a body of persons established for charitable purposes *only*, so as to be exempt from income tax under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918. In this case the distinction was taken between a purpose that was collateral and that which was incidental to the charitable purpose. In this case the purposes of the society are set out in sub-clauses (*a*) and (*b*) of the memorandum of association and are confined to science. Sub-clauses (*c*), (*d*), (*g*), (*i*) and (*s*) simply prescribe means for the attainment of the leading and strictly scientific objects stated in sub-clauses (*a*) and (*b*). Technical education means no more than scientific education for the word " science " in s. 1 includes applied science: see the observations of Lord Macnaghten in *Commissioners of Inland Revenue* v. *Forrest* (5). Technical education is a necessary part of scientific work for which the association exists.

[BUCKNILL L.J. In sub-cl. (*g*) the words are "by manu-"facturing, exhibiting and placing on the market any articles "or substances."]

The operative words are: "to develop, perfect and test the "values of such inventions, improvements, processes and "designs by . . . . placing on the market any article or sub-

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(1) [1894] 2 Q. B. 609, 627.
(2) [1896] A. C. 296.
(3) 15 App. Cas. 348.
(4) [1932] 1 K. B. 149.
(5) 15 App. Cas. 334, 353, 354.

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"stance to which the same may be capable of application." The whole of sub-cl. (*g*) must be read together. In sub-cl. (*l*) the word "in the case of work not affecting the whole of the "said trades or industries" refer back to the opening words of the sub-clause: "To carry out any of the above-mentioned "research or other scientific work." All learned societies publish the results of their work and in most cases the public are enabled to buy their publications. If this power to trade in their publications is incidental to scientific purpose it does not prevent the exemption. In *Reg.* v. *Overseers of Manchester* (1) the mere fact that the society bought and sold did not defeat the exemption. There is no case in the books where the exemption under s. 1 has been lost through a power to trade. The case was conducted on the basis that if there was any object or purpose in the memorandum of association to permit that to be done which was not for a scientific purpose or as a means thereto—if there was any collateral purpose, then the exemption is lost. There is no evidence here that the association was founded for other than scientific purposes. The sole question, if an object is taken which is said to be not scientific, is, was that incidental to a scientific purpose or was it collateral?

The association was supported wholly by annual voluntary contributions. The sum of 2,000*l.* was contributed by an associate member. The tribunal of fact has found that the association was supported in part by annual voluntary contributions and this court will not disturb that finding. The contention that an annual government grant is an annual voluntary contribution will be argued in the next appeal to come before the court, *British Launderers' Research Association* v. *Borough of Hendon Rating Authority* (2).

Percy Lamb in reply. Before it can be said that the decision of the tribunal of fact concludes the issue whether this association is supported in part by annual voluntary contributions, the meaning of the word "voluntary" must be determined and that is an issue of law. From a letter attached to the case it appears that the government grant was made on conditions and that prevents the contribution from being either voluntary or annual. The burden of proof is on the association to show that a contribution is both annual and voluntary and the evidence called was purely formal. This payment, in fact, was one-forty-ninth part of the total income.

(1) (1852) 16 Q. B. 449.

(2) Post, p. 462.

The sole other question is whether the association was "instituted" for scientific purposes. Ever since the decision in *British Non-Ferrous Metals Research Association* v. *Borough of St. Pancras* (1) it has been considered that a memorandum of association drafted, as that is in the present case, secures exemption. As has been contended, that is not the law.

Cur. adv. vult.

Dec. 3. BUCKNILL L.J. I will ask Jenkins J. to read the first judgment in this case.

JENKINS J. This is an appeal by the Battersea Borough Council from an order of the Divisional Court affirming, on appeal by way of case stated for the opinion of the court, a decision of the London court of quarter sessions, to the effect that the British Iron and Steel Research Association (which I will call "the association") is entitled in respect of its premises consisting of laboratories and appurtenances at 140, Battersea Park Road, to the exemption from rates afforded by the Scientific Societies Act, 1843, to societies "instituted "for purposes of science, literature, or the fine arts exclusively," and otherwise complying with the conditions of exemption prescribed by the Act. The scope of the exemption for which the association has been held to qualify is defined by s. 1. It is not disputed that the premises here in question are occupied by the association for the transaction of its business and carrying into effect its purposes, or that the association does not make any dividend gift division or bonus in money unto or between any of its members, or that the prescribed certificate has been duly obtained. But the appellant council contends that the association fails to qualify for the exemption in the two respects that it is not within the meaning of the Act: (i.) "instituted for purposes of science, literature, or the "fine arts exclusively" (science being here the relevant object); nor (ii.) "supported wholly or in part by annual "voluntary contributions."

In *British Non-Ferrous Metals Research Association* v. *Borough of St. Pancras* (1), decided in 1932 and closely resembling the present case in all its essential features, the Divisional Court held that the association there in question did qualify for exemption under s. 1 of the Act in both these respects, and it appears that in affirming the order of sessions the Divisional Court simply followed that decision as concluding the matter in favour of the association so far as the Divisional Court was concerned. This accounts for the absence of any reasoned judgment, and also means that the present appeal necessarily involves consideration of the question whether the case of *British Non-Ferrous Metals Research Association* v. *Borough of St. Pancras* (1), if indeed indistinguishable from the present case, was rightly decided.

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(1) 16 R. and I. T. Cas. 136.

[His Lordship stated the facts, reading the more material paragraphs set out in cl. 3 of the memorandum of association and the articles of association of the company already set out :]

On these facts, and in particular having regard to the objects of the association as set out in its memorandum, is the association a society instituted for purposes of science exclusively within the meaning of s. 1 of the Scientific Societies Act, 1843 ? The principles to be applied in answering this question may, I think, be thus stated :

(i.) " Science " for the present purpose includes applied, as well as pure or speculative, science, (see per Lord Macnaghten in *Commissioners of Inland Revenue* v. *Forrest* (2)), so that purposes directed to the promotion of science in its application to a particular trade or industry, such as the iron and steel trade or industry in the present case, may be regarded as purposes of science within the meaning of the section.

(ii.) The question whether a particular society is " instituted " for purposes of science literature or the fine arts exclusively " within the meaning of the section must be determined by reference to the purposes of the society as defined by its constitution, rather than the purposes it may actually have pursued in practice. This is, I think, borne out by the use of the word " instituted," which suggests that the section is directed to the purposes with a view to which the society is formed, and also by the requirements of the Act as to the certification of the society's laws, rules and regulations and alterations thereof as a condition of exemption, which seems to me to show that a society cannot qualify for exemption unless the purposes for which it is instituted are according to its laws, rules and regulations purposes falling wholly within s. 1 of the Act, or at all events that a society cannot so qualify if it is authorized by its laws rules and regulations to pursue purposes which do not fall within s. 1, whether it has in fact

(1) 16 R. and I. T. Cas. 136. (2) 15 App. Cas. 334, 353, 354.

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pursued those purposes or not. The document defining a society's purposes must no doubt be construed in the light of surrounding circumstances, and I do not exclude the possibility, in an appropriate case, of recourse to evidence as to the actual activities of the society as an aid to construction. Moreover, I do not think a claim for exemption should be allowed where the evidence shows a society to be in fact pursuing purposes falling outside s. 1, even though its authorized purposes, as defined by its constitution, may fall within the section. But, in general, I think a claim to exemption must stand or fall by reference simply to the society's authorized purposes, the circumstance that an authorized purpose has never in fact been pursued being irrelevant, unless and until the appropriate steps are taken, in accordance with the constitution of the particular society, to exclude it from the range of purposes authorized. I think this applies with particular force where, as here, the society concerned is a company incorporated under the Companies Act, with a memorandum of association formally stating, as required by that Act, the objects for which it is established. The conclusion that the presence in a society's constitution of an authorized purpose falling outside s. 1 of the Act of 1843 is fatal to the claim for exemption, whether that purpose has in fact been pursued in practice or not, accords with Lord Campbell's judgment in the case of *Reg.* v. *Cockburn* (1), where he said: "Purposes of science are undoubtedly "comprised within the scope of the institution thus described "and explained; but are the purposes so described and "explained *exclusively* scientific? We are bound to look at "all the purposes for which the society is professedly founded, "and to which, without a breach of trust, its funds may be "applied." It is also implicit in the following passage from Lord Watson's speech in *Commissioners of Inland Revenue* v. *Forrest*, where he said (2): "Then it is not sufficient "compliance with the plain language of the Act that a society "be established chiefly for the purpose of promoting science, "literature, or the fine arts. One or other of these must be "its exclusive object; so that an institution which also "contemplated some other, though altogether subsidiary, object "could not claim the benefit of the exemption."

(iii.) The word "exclusively" in s. 1 of the Act of 1843 means what it says. As observed by Lord Watson in the passage I have just quoted, it is not enough "that a society

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(1) 16 Q. B. 480, 490.

(2) 15 App. Cas. 348.

"be established chiefly for the purpose of promoting science, "literature or the fine arts," and the contemplation of "some "other, though altogether subsidiary, object" will be fatal to the claim for exemption.

(iv.) A distinction is, however, to be drawn between the purposes of a society and the means adopted to attain those purposes. Thus a society having for its purpose the promotion of science is not disqualified from exemption merely because its authorized activities include, as means of attaining that end, activities which considered as ends in themselves would be ends other than the promotion of science. The authorities for this proposition are reviewed in the judgment of Romer L.J. in the case of *Institution of Civil Engineers* v. *Commissioners of Inland Revenue* (1). It should be noted, however, that the extraneous activity must be only a means to the one end, as opposed to a distinct object (see per A. L. Smith L.J., in *Art Union of London* v. *Overseers of the Savoy* (2), and that the actual question Romer L.J. was considering was whether the advantages incidentally derived by members of the institution of civil engineers from their membership of that society sufficed to prevent it from being "a body of persons . . . . established for charitable purposes "only" within the meaning of s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918; while the particular instance of a means to an end which A. L. Smith L.J. was considering was "a lottery "whereby to draw money from the public for the promotion "of the fine arts"—an object on the face of it amounting to no more than a method of providing finance for the society's purposes.

It follows, on these principles, that in the present case the absence of any evidence (apart from the small matter of the taking out of three patents) that the association has in fact engaged in any activity which is not scientific in the strictest sense of that expression cannot conclude the matter in the association's favour; and that the association's claim to exemption can only be made good if, on the true construction of its memorandum of association, its objects as therein defined are directed exclusively to the one end of promoting science, either as being in themselves exclusively scientific in character or, if not in themselves exclusively scientific, as being authorized only as means to the one end of promoting science and not as distinct objects, however subsidiary they may be.

(1) [1932] 1 K. B. 149, 172, et seq.

(2) [1894] 2 Q. B. 609, 627.

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I find myself unable to construe cl. 3 of the association's memorandum of association as complying with these requirements. Sub-clauses (*a*) and (*b*) are, I think, clearly in terms confined to science. Sub-clause (*c*) is, however, wider in scope. It empowers the association to carry on "all kinds of "technical work and the designing building and development "of plant machinery and processes in connexion with the "said trades or industries." "Technical work" is, I think, a phrase of substantially wider import than "scientific work." No doubt all scientific work may be said to be "technical," but the converse by no means necessarily applies. Further, although the designing and development of plant and machinery may perhaps in this field be said to be an exclusively scientific operation, I cannot regard the building of plant and machinery as necessarily answering this description. Again, sub-cl. (*d*) empowers the association to provide funds "for any of the "purposes herein specified and for payment to any person . . . . "engaged in any such work." Under this provision, read in conjunction with sub-cl. (*c*), the association could provide sums for, or pay funds to any person engaged in, any kind of technical work connected with the trades or industries in question, which would so far as I can see, include the financing of an ordinary commercial iron or steel works. Again, sub-cl. (*d*) also authorizes the association "to encourage and improve the "technical education of persons who are likely to be engaged "in the said trades or industries or work," which would, as it seems to me, include (for instance) the provision of practical courses of instruction for intending iron and steel operatives or works managers—courses perhaps wholly, perhaps partly, scientific, or perhaps not scientific at all, and by no means necessarily devoted exclusively or at all to science in any ordinarily accepted sense of that expression. Passing to sub-cl. (*l*) one finds that read in conjunction with sub-cll. (*c*) and (*d*) it would (for example) authorize the association to undertake any kind of technical work affecting the business of any particular member. This would, so far as I can see, include the undertaking by the association of the management of a member's iron or steel works, an activity which I think clearly goes far beyond the exclusive pursuit of science. Sub-clause (*s*), relating to the collection, arranging, indexing and publishing of information, and the maintaining of a bureau of information for the benefit of members, was referred to by counsel for the borough council, but not, I think, strongly relied on, as another instance of a non-scientific object. It is perhaps rather near the line, but in view of its nature I would on the whole be disposed to regard it as a means for the attainment of the association's substantive purposes rather than as an end in itself, and therefore as not affording sufficient ground for withholding the exemption if (contrary to my view) those other purposes could be held to be exclusively scientific. I have left sub-cl. (*g*) to the last. That sub-clause empowers the association to acquire any patents or licences relating to any inventions, improvements or processes which may seem capable of being used by members of the association for any of the purposes of the trades or industries in question, and to acquire and register designs or standardization marks, with a view to the use thereof by members and others upon such terms as may seem expedient. I cannot regard this as a scientific object. An invention is or may be the fruit of scientific research. But the taking out of a patent in respect of it is not a promotion of science; it is the securing of a statutory monopoly with a view to the commercial exploitation of the invention in question. Moreover, the sub-clause is not, so far as I can see, limited to inventions attributable to the association's own researches. Patents or licences could, under this power, be acquired in respect of inventions, with the making of which the association had nothing to do, and commercially exploited. Theoretically, the association might, without exceeding its powers under this sub-clause, buy up all the key patents relating to the industries in question and license them exclusively to members of the association. This would be trade protection, not science, and might well prove the very antithesis of the promotion of science. That the power might be exercised in practice to the profit of members is recognized by the second proviso to cl. 4 of the memorandum. The registration of designs and standardization marks with a view to use thereof by members and others also contemplated by sub-cl. (*g*) of cl. 3 is, I think, again in the nature of a commercial as opposed to a scientific object. We were invited by counsel for the association to construe sub-cll. (*c*), (*d*), (*g*), (*l*) and (*s*) of cl. 3 as simply prescribing means for the attainment of the leading, and strictly scientific, objects stated in sub-cll. (*a*) and (*b*). With the somewhat doubtful exception of sub-cl. (*s*) I cannot so construe them. With that somewhat doubtful exception, none of the objects in the sub-clauses to which criticism has been directed are, in their nature, merely ancillary or adjective and there is nothing in the language of any of them purporting to limit their use so as to authorize them merely if, and to the extent to which they can serve, as means to the attainment of the ends comprised in subcll. (*a*) and (*b*).

On the question of technical education we were referred to *Royal College of Music* v. *Westminster Vestry* (1) where it was held that the teaching of music was a means of promoting the fine art of music. But this proceeds on the ground that music is a fine art, and only goes to show in the present case that the teaching of science is a means of promoting science, not that technical education is necessarily and exclusively scientific education, as in my view it is not. More to the point, I think, is *School of Oriental and African Studies* v. *Westminster City Rating Authority* (2), where the provision of courses suitable to the needs of persons intending to proceed to the East or Africa for (inter alia) the public services or commerce was held to be neither the promotion of science, literature or the fine arts, nor to be regarded merely as a means to one or other of those ends, with the result that the claim of the school to exemption under s. 1 of the Act of 1843 was rejected.

It was pointed out that the memorandum of association includes several objects which are in their nature clearly ancillary objects only, such as powers to undertake trusts, borrow money, hold land, and so forth, and we were invited to adduce from this that the objects to which criticism was directed were also to be regarded as merely ancillary. I cannot accept this argument. There is, I think, a clear distinction between clauses conferring powers of a general nature which any company will need in order to conduct its affairs, whatever the nature of those affairs may be, and object clauses directed to defining the particular range of affairs in which the company proposes to engage.

For these reasons I am of opinion that the association is not instituted for purposes of science exclusively within the meaning of s. 1 of the Act of 1843, and accordingly, that its claim to exemption fails on this ground.

It remains to consider whether the association is supported wholly or in part by annual voluntary contributions within the meaning of the section. The association's accounts for the period from June 27, 1944 to December 31, 1945, show its

(1) [1898] 1 Q. B. 304; (C. A.) 809.

(2) [1940] 2 All E. R. 537.

total income for that period to have been 99,474*l.* 12*s.* 5*d.*, of which 91,700*l.* made up of subscriptions and contributions in support of general funds, 62,000*l.* and " Government Grant " 29,700*l.*," is claimed to consist of annual voluntary contributions. The 62,000*l.*, as appears from the case stated, is made up of 60,000*l.* received from the federation and 2,000*l.* voluntarily contributed by an associate member.

It is clear from the cases of *Commissioners of Inland Revenue* v. *Forrest* (1) and *Overseers of the Savoy* v. *Art Union of London* (2), that in order to qualify as a voluntary contribution for this purpose a contribution must in substance be charitable or altruistic in character—a payment made in support of the society for the sake of the public utility of its purposes, as opposed to a payment comparable to the subscription made by a member of a club for the sake of the private advantages of membership. In other words, the Act in effect stipulates that there must be members of the public prepared to put their hands in their pockets to support the society from motives of public spirit as opposed to private gain. This does not, however, mean that a subscription is prevented from being a voluntary contribution merely because it carries with it membership of the society and certain incidental advantages are conferred by membership. The substance of each case must be looked at to see whether the payments claimed to be voluntary contributions are, in substance, made as a matter of business, or as a matter of bounty.

The facts with regard to the associate member's contribution of 2,000*l.* are far from fully stated in the case, the only information given being that " An associate member voluntarily " contributes 2,000*l.* in support of the general funds." I am unable, on these facts, to come to any conclusion whether it is or is not an annual voluntary contribution within the meaning of the section. Assuming in favour of the association that this is a voluntary contribution, it amounts to very little more than 2 per cent. of the total income, and although this branch of the section is satisfied, if the association is supported in part by annual voluntary contributions, I cannot think that this insignificant proportion could in itself properly be regarded as even partial support for this purpose. A reasonable construction must be placed on the section, and I think it requires that the association should be dependent for its support either wholly or to something more than a merely nominal extent on voluntary contributions. It is true that in *Royal College of Music* v. *Vestry of St. Margaret's* (1), Hawkins J. held that 1,632*l.* treated by him as derived from annual voluntary contributions to be "a substantial sum and in "his opinion quite sufficient to satisfy the requirements "of the proviso," but the total income there was only 18,780*l.*, so that the proportion borne by the supposedly voluntary contributions to the total income (which must be the material consideration) was far higher than in the present case.

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(1) 15 App. Cas. 334. (2) [1896] A. C. 296.

As to the 60,000*l.* received from the federation, this is the contribution which members of the association (who must all be members of the federation or an association affiliated thereto, except by special dispensation of the council, vide art. 5) engage by art. 19 to use their best endeavours to procure the federation to pay. I think this stipulation in art. 19 (though, of course, throwing no direct obligation on the federation) clothes the payment in question with a quasi-compulsory character which suffices to prevent it from being a "voluntary "contribution" for the present purpose. If I am wrong in this, I think at all events that the 60,000*l.* is in no better position in this respect than the subscriptions of members themselves would be. Having regard to the obvious and important business advantages calculated to accrue to members from the promotion of the objects of the association as defined in its memorandum, I do not think their ordinary subscriptions could be classed as "voluntary contributions," and if they, as members of another institution, cause that institution to contribute to the promotion of those same objects, I think the contribution so procured is no more a "voluntary contribution" than if it had been made direct by the members themselves.

Lastly, as to the government grant. This is paid out of public funds allocated to such purposes by the Department of Scientific and Industrial Research on the terms of a letter, attached to the case stated. It is conditional upon other income approved as grant earning being raised to a stated minimum amount in each year, and operates for a period of five years from January 1, 1945. The letter also contains a number of stipulations designed (in effect) to secure that the results of the association's researches are made available as the public interest may demand. These conditions and stipulations were relied on by counsel for the borough council as excluding the government grant from the category of voluntary contributions. But I think the objection goes deeper. In my view, a grant out of public funds, or in other words a contribution at the expense of the general body of taxpayers, is not a " voluntary contribution " within the meaning of the section or within any ordinarily accepted sense of that expression. It is, I should have said, the very antithesis of a voluntary contribution. There is a line of authority to the contrary, but, on investigation, all these cases will be found to stem from the passage in the judgment of Hawkins J. in *Royal College of Music* v. *Westminster Vestry* (1), in which he treated 1,632*l.* as representing voluntary contributions. Arithmetically, that figure included a government grant to the college of 500*l.*, and Hawkins J. was accordingly taken as having decided that a government grant is a voluntary contribution. This implied decision was followed in *Hornsey School of Art* v. *Edmonton Union* (2), and thereafter was regarded as settled. The last of these cases was, I think, *Westminster City Council* v. *Royal United Service Institution* (3), and they include the *British Non-Ferrous Metals Research Association's* case (4), which involved this point also.

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(1) [1898] 1 Q. B. 304, 311.

There is no authority binding us to perpetuate what I consider to be a clearly mistaken view. I prefer to hold (with the implied support of Lord Halsbury in the *Art Union of London's* case (5) and the express support of the Divisional Court in *Liverpool Corporation* v. *West Derby Union* (6) (a case which was, as I think wrongly, not followed in the *Hornsey School of Art's* case (2)), that a grant out of public funds is not a voluntary contribution within the meaning of the Act.

I find it impossible to distinguish the *British Non-Ferrous Metals Research Association's* case (4) in any material respect from the present case, either as regards the purposes of the association or on the question of the government grant. Accordingly, I am of opinion that this case must be regarded as having been wrongly decided.

In the result, I am of opinion that the appeal succeeds on both points and should be allowed.

BUCKNILL L.J. I agree that this appeal should be allowed, for the reasons stated by Jenkins J. in his judgment. As we

(1) [1898] 1 Q. B. 304.

(2) 70 J. P. 121; 4 L. G. R. 178.

(3) [1938] 2 All E. R. 545.

(4) 16 R. and I. T. Cases 136.

(5) [1896] A. C. 296, 308.

(6) 69 J. P. 277; 3 L. G. R. 647.

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are differing from the judgment in 1932 of the Divisional Court in the *Non-Ferrous Metals* case (1) I will add a few observations on the present case. The issues on this appeal are whether the British Iron and Steel Research Association is a society (1.) instituted for purposes of science exclusively, and (2.) supported wholly or in part by annual voluntary contributions within the meaning of s. 1 of the Scientific Societies Act, 1843, which is described as an Act " to exempt from Rates, " Land and Buildings occupied by Scientific or Literary " Societies."

The importance of the word " exclusively " in the Act of 1843 seems to me to go to the root of the present case. In this connexion I may quote from the speech of Lord Macnaghten in *Commissioners of Inland Revenue* v. *Forrest* (2), where he says : " It may be that the advancement of the interests of the profession of civil engineering is inseparably bound up with the " advancement of mechanical science. Probably the founders of " the society were not insensible of the advantages which such " an institution was likely to confer upon its members in their " professional capacity. That would have been a formidable " objection if the language of the Act of 1885 had been the " same as that of the Act of 1843." The question in the present case is whether this " formidable objection " exists in the case of the British Iron and Steel Research Association. In other words, has the association been formed partly for the purpose of conferring commercial advantages upon its members in their capacity as manufacturers of iron and steel ? I think that the answer to this question must be found in an examination of its memorandum of association and articles of association. It seems to me that such an examination leads to the conclusion that the association was partly instituted for the commercial advantage of its members in their capacity as manufacturers.

It was argued that the present case was practically identical with the case of *British Non-Ferrous Metals Research Association* v. *Borough of St. Pancras* decided in the Divisional Court, consisting of Lord Hewart C.J. and Avory and Macnaghten JJ. on April 21 and 28, 1932 (1). This case is also reported in the Rating and Income Tax Journal published on April 30 and May 7, 1932.

Lord Hewart C.J., in the course of his judgment, said that the principal objects of the association as set out in (*a*) of the

(1) 16 R. and I. T. Cases 136.

(2) 15 App. Cas. 334, 354.

memorandum of association were "clearly purposes of science." One of the avowed objects therein of the Non-Ferrous Metals Research Association was to encourage and improve the education and develop the skill of persons who are engaged or are likely to be engaged in the industry. With the greatest respect to that eminent judge, I venture to think that such encouragement and improvement of education and development of skill were not for the purpose of science exclusively, having regard to the contents of the memorandum of association as a whole. Lord Hewart also said that all the other objects contained in the memorandum were merely incidental to, and in furtherance of the principal objects as already set out, and that, in view of the decision in the case of the *Institution of Civil Engineers* v. *Commissioners of Inland Revenue* (1), there was ample evidence upon which the court of quarter sessions could find that the Non-Ferrous Metals Research Association was a society instituted for the purposes of science exclusively within the meaning of the Act. Lord Hewart added: "Objects which are merely incidental to and in "furtherance of purposes of science are, I think, themselves "purposes of science." The case referred to by Lord Hewart was heard by the Court of Appeal in May and June, 1931. In that case the Institution of Civil Engineers claimed to be exempt from the payment of income tax on the ground that it was a body of persons established for charitable purposes only. Rowlatt J. held that the institution was not established for charitable purposes only, because there was a collateral advantage to the members as civil engineers in addition to the promotion of science, but the Court of Appeal reversed this decision. The purposes of the Institution of Civil Engineers as proved in that case seem to me substantially different from the purposes of the Non-Ferrous Metals Research Association. The education and development of the skill of persons likely to be engaged in the non-ferrous metals industry were not merely incidental to the main purposes of the association; but, in my opinion, they were collateral purposes, and cannot properly be described as scientific purposes.

I think, therefore, the association has failed to establish that it was instituted for the purposes of science exclusively.

DENNING L.J. I agree with the judgments, both of my Lord and Jenkins J., and I only add a word on the question of voluntary contribution.

(1) [1932] 1 K. B. 149.

This association received a contribution from the federation amounting to some 6,000*l*. This is clearly not a voluntary contribution, because the federation receives its funds from the members of the association and the payment is in effect a payment by the members in order to get the benefit of the work of the association. There is also a government grant of some 29,700*l*., which was also not a voluntary contribution. But there was one payment of 2,000*l*. as to which all that is said in the case stated is that "an associate member voluntarily "contributed 2,000*l*. in support of the general funds." Assuming that this 2,000*l*. was a voluntary contribution, is it correct to say that the association is "supported in whole or in part by "voluntary contributions?" The total income from June, 1944, to the end of December, 1945, was 99,474*l*. 12*s*. 5*d*. but the balance of income over expenditure was 13,030*l*. 16*s*. 2*d*. It is difficult to suppose that the association was "supported" by this 2,000*l*. A society is only "supported in whole or in part by voluntary con- "tributions" if it has to rely on them for the continuance of its work. The sum of 2,000*l*. is too small a proportion of the whole income to enable that inference to be drawn.

I agree the appeal should be allowed.

Appeal allowed.

Solicitors for the rating authority: *Sharpe Pritchard & Co., for the Town Clerk of Battersea.*

Solicitors for the society: *Allen & Overy.*

C. G. M.

BRITISH LAUNDERERS' RESEARCH ASSOCIATION v. BOROUGH OF HENDON RATING AUTHORITY.

APPEAL from a decision of the Divisional Court on a case stated by the Middlesex quarter sessions.

On November 9, 1946, the association made a proposal for the amendment of the valuation list for the borough of Hendon in respect of a hereditament owned and occupied by them: "site, laundry and premises, research laundry" assessed at no gross, but at 360*l*. rateable value. The association claimed that they were exempt from rates by reason of s. 1 of the

Scientific Societies Act, 1843. No demand for rates had been received by the association for twenty years before 1946. The Central Middlesex Assessment Committee refused the claim but altered the description of the site from: "site, "laundry and premises, Research Laundry" to: "Research "laboratories, Experimental Laundry, site and premises," and inserted a gross value of 436*l.* The association appealed to quarter sessions, the rating authority only appearing as respondents. Quarter sessions held that the association came within the terms of the section and the rating authority appealed to the Divisional Court.

The association was a company limited by guarantee registered on July 23, 1920, established for the promotion of research and other scientific work in connexion with the laundry and cleaning trades or industries as set out in the memorandum of association and also as there stated, inter alia: to encourage and improve the education of persons who are engaged, or likely to be engaged in the said industries 3 (*a*); to publish and circulate literary matter treating of and bearing upon the laundry and cleaning trades or industries 2 (*b*); to establish and maintain libraries and collections of literature and other information relating to the said trades 2 (*b*); to disseminate information by means of the reading of papers, delivery of lectures, giving of advice and by the appointment of advisory officers 3 (*b*); further to encourage and make known the nature and merits of inventions, improvements, processes, materials and designs which may seem capable of being used by members of the association and others for any of the purposes of the said trades or industries 3 (*b*).

The hereditament comprised a laboratory block containing analytical, chemical, textile, bacteriological and two physical chemical laboratories, an instrument laboratory also used for constructing the association's own scientific instruments, a micro-photograph and ultra-violet light laboratory. Also in the block were an engineer's drawing office, machine shop, both for building special appliances and maintenance of existing appliances, a library of scientific and technical books, an office dealing chiefly with technical reports, directors' and secretaries' rooms and cloakrooms. A separate building contained an experimental laundry for carrying out applied research on normal work and special work. There were also a boiler house, water softeners and coal and water storage places. Adjoining the laboratory was a temporary building

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containing technical report writing and study room, a demonstration laboratory and an information section. In another temporary building were demonstration and lecture rooms.

From a brochure issued by the association there was a regular system of visiting the laundries of members with a view to investigating problems of the laundries. A fee of 5*l.* 5*s.* 0*d.* per day was charged, plus expenses. "These services being "regarded as particular to the members concerned and for "this reason a fee of five guineas per day plus expenses is "charged. The advantages of periodical visits to members' "laundries are well recognized and the special service outlined "above has been extended to development visits, which "are made without charge by a member of the research "staff who is conversant with practical laundry work. This "section of the work has a direct appeal to owners of laundries "and has proved to be very popular. Arrangements have "been made by which each member's laundry will be so visited "every two years."

The problems under investigation in the laboratories were not confined to problems of interest only to the laundry industry, but included the study of pure scientific subjects, such as ultra-sonics, electronics and bacteriological cross-infection in medical processes generally with a view to their ultimate application to the industry in particular. The total staff numbered seventy-four, of whom twenty-six were qualified scientists and fourteen were technical assistants. The remainder were laundry and office staff. (Paragraphs 2 (*a*) to (*j*) in the case stated.)

Members of the association could and did apply the results of the association's researches to practical advantage in their businesses, but the whole of the association's activites were directed towards increasing the sum of scientific knowledge in relation to laundering and its application thereto (paragraph 2 (*k*) in the case stated).

It was not contested that the association were not able to make any dividend, gift, division or bonus in money to its members.

The association received a grant from the Committee of the Privy Council for Scientific and Industrial Research, which, in the year 1946, was 8,500*l.* Students' fees amounted to 1,702*l.* and technical advice fees to 359*l.* 17*s.* 7*d.* The members of the association were proprietors in the laundry and cleaning industries, who paid an annual subscription, varying with the size of their businesses.

Before the Divisional Court it was not admitted that the association was supported wholly or in part by voluntary contributions but it was agreed that this point could not be argued before that court.

The Divisional Court reversed the decision of quarter sessions, holding that the association was not instituted for purposes of science exclusively but also for purposes of a commercial nature, not merely incidental to the purposes of science, namely, the advancement of the interests of its members who were engaged in the trade or industry of launderers.

The occupiers appealed.

Michael Rowe K.C. and *W. L. Roots* for the association. If my contention on the first point in the *Metropolitan Borough of Battersea* v. *The British Iron and Steel Research Association* (1) is wrong, that covers this case. Here the quarter sessions, the tribunal of fact, have found in favour of the occupiers and that decsion should not have been disturbed by the Divisional Court. The visits made to laundries by members with a view to investigating problems of the laundries for which 5*l*. 5*s*. 0*d*. a day was charged plus expenses were merely incidental towards increasing the sum of scientific knowledge. The issue of fact is really one for quarter sessions. See the observations of Tucker L.J. in *School of Oriental and African Studies* v. *Westminster City Rating Authority* (2).

[Denning L.J. "A distinction must always be drawn "between a finding of fact and inferences drawn from a finding "of facts."]

Having found a scientific truth it is still a purpose of science to apply it. Again, the dissemination of knowledge is the promotion of knowledge, which is a scientific purpose. The judgments in *Commissioners of Inland Revenue* v. *Forrest* (3) make it clear that the fact that benefits to members result from the operations of a society is immaterial, so long as these benefits were not the purposes for which the society was instituted.

There was no argument in either appeal before quarter sessions or the Divisional Court on whether the association was supported in part by annual voluntary contributions owing to a decision in *British Non-Ferrous Metals Research Association* v. *Borough of St. Pancras* (4). As to the British Iron and Steel

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(1) Ante p. 434.

(2) [1940] 2 All E. R. 537, 542.

(3) 15 App. Cas. 334.

(4) 16 R. and I. T. Cases 136.

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Research Association, the federation is an independent body distinct from the members of the association and of the federation. The federation by its contribution is acting with the disinterested motive of endeavouring to see that scientific research in the iron and steel trades is properly constituted. The argument of counsel in the *British Iron and Steel* case was that the government grant in that case was not a voluntary contribution because it was made subject to certain conditions. The government, it was said, got a quid pro quo. But the whole object of the contribution by the government both in that case and in this, is granted for the common good of science. The conditions are imposed for the benefit of the country as a whole. "Voluntary" as used in this section does not mean not compulsory; it means gratuitous, without any money or other merely material consideration: See *Overseers of the Savoy* v. *Art Union of London* (1).

[Denning L.J. Are hospitals to-day supported by voluntary contributions?]

If I offer to pay 5*l.* to a charity is that not a voluntary contribution? If a bed is endowed in a hospital for the member of a certain class, that is a voluntary contribution notwithstanding the condition as to the class of patient. The mere fact that conditions are imposed on the use to which a contribution is put, does not render it not voluntary. From the date of the *Savoy* case (1) government grants have been held to be voluntary contributions. The decision of the Divisional Court was wrong and should be reversed.

Fitzgerald K.C. and *J. Ramsay Willis* for the rating authority. To secure exemption a society must be instituted for purposes of science exclusively. The position in law is correctly stated in Ryde on Rating (8th ed.) at p. 152, para. 143: "In order "to come within the Act, the document defining the purposes "for which the society is instituted must exclude purposes "which would not come within the Act, in such a way that an "application of the funds or efforts of the society to such "purposes would be ultra vires. It is further submitted "that if the society be instituted for two purposes, one of which "is within the Act, while the other is not, the society cannot "claim exemption, even though the society be in fact carried "on solely to promote that purpose which is within the Act." See also the rest of para. 143. In this case, if the government grant was not a voluntary contribution, it is clear that there

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(1) [1896] A. C. 296.

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was no other contribution which was voluntary. In the case of *Hornsey School of Art* v. *Edmonton Union* (1) it is clear that the court decided that a government grant was a voluntary contribution because they felt bound by the decision in *The Royal College of Music* v. *St. Margaret's Vestry* (2). But that had never been decided in the *Royal College of Music* case (2). There was evidence in that case of voluntary contributions made to the society of 1,132*l.* and a government grant of 500*l.* was paid to the society. The court by their judgment said that the voluntary contributions were 1,632*l.* This may well have been a slip but that casual statement has been treated subsequently by the Divisional Court as a decision that a government grant is a voluntary contribution. Kennedy L.J. in *Mayor of Liverpool* v. *West Derby Union* (3) had decided that the contribution in that case from the education authority was not voluntary. The case of *Non-Ferrous Metals Research Association* v. *Borough of St. Pancras* (4) continued the chain of error. Lord Hewart C.J. based his judgment in that case on *Hornsey School of Art* v. *Edmonton Union* (1) which itself was wrongly based on the *Royal College of Music* case (2). (*Commissioners of Inland Revenue* v. *Forrest* (5) was again referred to.)

Michael Rowe K.C. replied.

Cur. adv. vult.

Dec. 3, 1948. BUCKNILL L.J. I will ask DENNING L.J. to give the first judgment.

DENNING L.J. The first question is, what is the true interpretation of the words " for the purposes of science, " literature or the fine arts exclusively " in s. 1 of the Scientific Societies Act, 1843. There is one thing which is clear both on the wording of the statute and on the cases. The word " exclusively " must be given its full effect. It is not sufficient that the society should be instituted " mainly " or " primailry " or " chiefly " for the purposes of science, literature or the fine arts. It must be instituted " exclusively " for those purposes. The only qualification—which, indeed, is not really a qualification at all—is that other purposes which are merely incidental to the purposes of science and literature or the fine arts, that is, merely a means to the fulfilment of those purposes, do not deprive a society of the exemption. Once however, the other purposes cease to be merely incidental but become collateral; that is, cease to be a means to an end, but become an end in themselves; that is, become additional purposes of the society; then, whether they be main or subsidiary, whether they exist jointly with or separately from the purposes of science, literature or the fine arts, the society cannot claim the exemption. That is, I think, made quite clear by the opinions of Lord Watson and Lord Macnaghten in *Commissioners of Inland Revenue* v. *Forrest* (1).

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(1) 70 J. P. 121; 4 L. G. R. 178.

(2) [1898] 1 Q. B. 304; (C. A.) 809.

(3) 69 J. P. 277; 3 L. G. R. 647.

(4) 16 R. and I. T. Cases 136.

(5) 15 App. Cas. 334.

More difficulty arises, however, in saying what are "the "purposes of science." Science includes, of course, not only pure or abstract science, such as pure mathematics, but also the applied sciences, such as electricity or engineering: and the purposes of science include not only the advancement of knowledge by research work, but also the dissemination of it by lectures or teaching or writing. Take the department of engineering at Cambridge. It is undoubtedly instituted for the purposes of science exclusively; and although it undertakes the training of students, that is merely incidental to the purposes of science (see the case of the *Royal College of Music* v. *Vestry of St. Margaret's* (2).

The purposes of science, however, do not include the purposes of the firms or persons who make use of science. Many of our great industrial concerns, such as I.C.I., make use of science and, indeed, institute research laboratories for the purposes of science, but only as incidental to their industrial purposes. So also our technical schools make use of science and institute laboratories for the purposes of science, but only as incidental to the training of craftsmen. In such cases the laboratories are instituted for the purposes of individuals, not for the purposes of science except as incidental to the purposes of individuals.

Trade research associations stand mid-way. They are instituted for the purposes of science and also for the purposes of the members who make use of science. Neither purpose is merely incidental to the other. Each is collateral to the other. The associations are instituted for the two purposes jointly, and are therefore not instituted for the purposes of science exclusively—see the cases of the *Jenner Institute*

(1) 15 App. Cas. 334, 348, 354. (2) [1898] 1 Q. B. 304; (C. A.) 809.

of Preventive Medicine v. *St. George's Union* (1) and the *School of Oriental and African Studies* v. *Westminster City Rating Authority* (2).

There are two cases, however, to which I must specifically refer. The first is *Reg.* v. *Institution of Civil Engineers* (3). In that case the Institution of Civil Engineers was held not to be exempted by the Act 1843, from being rated. The decision was clearly right, but the court took the wrong test. The court there asked itself: What was the main and substantial object of the association? Was it the purposes of science? or, Was it the purposes of its members? That would have been a proper test under s. 11 of the Customs and Inland Revenue Act, 1885, but was a wrong test under the Scientific Societies Act, 1843, because it gave no effect to the word "exclusively." Applying that wrong test, the court thought that the main and substantial object of the institution was for the purposes of its members. That finding was in effect overruled by the decision of the House of Lords in *Commissioners of Inland Revenue* v. *Forrest* (4). The House of Lords found that the main object of the institution was the promotion of science, and it was on that account exempt from inland revenue duty. But the House of Lords evidently thought that the institution had, as a subsidiary object, the purposes of its members: and that therefore the actual conclusion of the court in the rating case was right, because the association was not instituted for the purposes of science exclusively, but also for the purposes of its members. This is, I think, what both Lord Watson and Lord Macnaghten had in mind in *Commissioners of Inland Revenue* v. *Forrest* (5). In a yet later revenue case in the Court of Appeal about the *Institution of Civil Engineers* (6), the judges thought that the actual conclusion in the rating case was virtually overruled by the House of Lords in the revenue case: and that the rating case can only be supported on the ground that the institution was not supported by voluntary contributions. There is nothing in the report of the rating case, however, to suggest that the institution was not supported by voluntary contributions. It was assumed by everybody that it was: and it is obvious that, even if the members' subscriptions were not voluntary contributions, there may have been other contributions which were voluntary contributions. When Lord Macnaghten said that he entirely agreed in the conclusion of that case, he meant that he agreed with the actual conclusion that the Institution of Civil Engineers was not instituted for the purposes of science exclusively. I cannot agree, therefore, with what was said about the rating case in the later revenue case (1). The decision in the later case was that the Institution of Civil Engineers was established for charitable purposes only. That decision has no bearing here. It is obvious that an association may be established for charitable purposes only, and yet not be instituted for the purposes of science exclusively.

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(1) 69 L. J. (Q. B.) 814; Ryde and Konstam's Rating Appeals, 1894–1904, at p. 242.

(2) [1940] 2 All E. R. 537.

(3) 5 Q. B. D. 48.

(4) 15 App. Cas. 334.

(5) Ibid. at p. 348 lines 14 to 8 from the bottom of the page; 353, lines 14 to 10 from the bottom and 354, lines 9 to 4 from the bottom.

(6) [1932] 1 K. B. 149.

The other case to which I must particularly refer is *British Non-Ferrous Metals Research Association* v. *Borough of St. Pancras* (2). The Divisional Court there seems to have been much influenced by the *Civil Engineers* case about "charitable purposes only." If they had put it on one side, as they might have done, because it was a decision on a different statute, they might, I think, have come to a different conclusion. Applying the principles I have stated, I think the decision in the *Non-Ferrous* case was wrong.

The second question is what is the proper way of seeing whether a society is "instituted" for those purposes. Does the exemption depend on the purposes of the society as defined in the memorandum of association, or on the purposes which the society in fact pursue?

In my opinion, in cases where there is a memorandum of association, it should be regarded as the best evidence of the purposes for which the society was instituted. If it appears clearly from the memorandum that some of the purposes for which the society is instituted are not the purposes of science, literature or the fine arts or incidental thereto, then the society cannot claim the benefit of the exemption, even though it does not for the time being in fact pursue those alien purposes. *Reg.* v. *Cockburn* (3). If, however, there is no memorandum of association, or if the memorandum is not clear on the point, as for instance, if some of the purposes may or may not be incidental to the purposes of science, literature or the fine arts, then regard may properly be had to the purposes which

(1) [1932] 1 K. B. 149.
(2) 16 R. and I. T. Cases 136.
(3) 16 Q. B. 480.

the society has in fact pursued: for, if it in fact pursues alien purposes, it cannot claim the exemption, *Purvis* v. *Traill* (1), per Parke B. A society cannot get exemption from rates by saying that what they are doing is ultra vires. The court will assume that the purposes which it pursues are purposes for which it was instituted.

Applying these rules to the case of British Launderers' Research Association, the first task is to interpret the memorandum, articles and by-laws of that association and see what are the purposes for which it was instituted. The members are firms in the laundry and cleaning industries who pay an annual subscription varying with the size of their businesses. Viewing the nature and objects of the association as a whole, I think it plain that the association is instituted not only for the purposes of science, but also for the purposes of the members of the association and others engaged in the industry. It is instituted for the purposes (inter alia) of encouraging and improving the education of persons who are engaged in the said industry, 3 (*a*); of disseminating information by giving of advice, 3 (*b*); and making known the nature and merits of processes, and so forth, 3 (*d*). These purposes are not merely incidental to the purposes of science. The association cannot, therefore, be said to be instituted for the purposes of science exclusively. Even if I had any doubt on the interpretation of the articles, however, it is removed by the purposes which the association in fact pursue. The brochures about their activities (such as courses for students, development visits and technical advice at members' laundries, and so forth) show that they pursue the purposes of their members with as much zeal as they pursue the purposes of science.

Mr. Rowe says, however, that quarter sessions came to a conclusion of fact in his favour with which the Divisional Court should not have interfered. On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as original documents. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If, and in so far as, those conclusions can as well be drawn by a layman (properly

(1) 3 Exch. 350.

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instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact: and the only questions of law which can arise on them are whether there was a proper direction in point of law; and whether the conclusion is one which could reasonably be drawn from the primary facts: see *Bracegirdle* v. *Oxley* (1). If, and in so far, however, as the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a trained lawyer—as, for instance, because it involves the interpretation of documents or because the law and the facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer—the conclusion is a conclusion of law on which an appellate tribunal is as competent to form an opinion as the tribunal of first instance.

Applying these principles to the case stated, the primary facts are stated in para. 2 (*a*) to (*j*). Paragraph 2 (*k*) contains a conclusion of fact, but it is not a conclusion on the question at issue. The question is whether the association was instituted for the purposes of science exclusively. That is, a conclusion of law to be drawn from the primary facts, particularly, but not exclusively, from the memorandum and articles of association, and involves questions of interpretation of those documents and of the Act. The Divisional Court were able, and indeed bound, to form their own opinion as to the proper conclusion to be drawn from those primary facts, and I find myself in entire agreement with them.

The final question is whether a society which is supported in part by a government grant can be said on that account to be "supported in part by voluntary contributions."

In my opinion, "voluntary contributions" are payments made without compulsion and without any view to recompense, save the gratitude of one's fellow men. They are payments made by private citizens for the public benefit, and out of a sense of public duty, thus relieving the state of an expenditure which otherwise it might have had to bear. They do not include government grants. No ordinary person would regard an institution which was supported only by government grants as being supported by voluntary contributions. This view is borne out by the words of Lord Halsbury in *Art Union of London* v. *Overseers of Savoy* (2).

It is interesting to trace, however, how a different decision has been reached in some cases in the Divisional Court. When the case of the *Royal College of Music* v. *St. Margaret's Vestry* (3) was in the Divisional Court there was evidence of voluntary contributions of 1,132*l.*, and of a government grant of 500*l.* The court in its judgment said that the voluntary contributions amounted to 1,632*l.* That may well have been a slip. It was quite immaterial whether they were 1,132*l.* or 1,632*l.*, but that casual statement has been treated in subsequent cases in the Divisional Court as a decision that a government grant is a voluntary contribution, see *Hornsey School of Art* v. *Edmonton Union* (1), the *Non-Ferrous Metal* case (2), and *Westminster City Council* v. *Royal United Service Institution* (3).

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(1) [1947] K. B. 349.

(2) [1896] A. C. 296, 305.

(3) [1898] 1 Q. B. 304.

None of these cases gives any reasons in support of that view. Mr. Rowe argued that we should not upset those decisions after fifty years: but they were not uniform. All the time there was a decision of the Divisional Court the other way: for in *Mayor of Liverpool* v. *West Derby Union* (4), one of the grounds of the decision was that a grant by an education authority was not a voluntary contribution. Kennedy J. said emphatically that to call it "a voluntary "contribution is to do violence to the ordinary meaning of "language." Moreover, upon the question whether annual subscriptions were voluntary contributions the House of Lords in the *Art Union of London* v. *Overseers of Savoy* (5) case overruled a course of decisions going back for fifty years. So we should overrule those on this point. In my opinion, therefore, a government grant is not a voluntary contribution. It follows that the association is here not entitled to exemption from rates. It is not instituted for the purposes of science exclusively: and it is not supported in whole or in part by voluntary contributions. In my opinion, this appeal should be dismissed.

BUCKNILL L.J. I agree that the appeal should be dismissed for the reasons given by Denning L.J. in his judgment, to which I have nothing to add.

JENKINS J. I also agree.

Appeal dismissed.

Solicitors for occupiers: *Callingham, Griffith & Bate.*

Solicitors for rating authority: *Leonard Worden, Town Clerk of Hendon.*

(1) 70 J. P. 121; 4 L. G. R. 178.
(2) 16 R. and I. T. Cases 136.
(3) [1938] 2 All E. R. 545.
(4) 69 J. P. 277; 3 L. G. R. 647.
(5) [1896] A. C. 296.

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Lord Greene M.R. and Wynn Parry J.

Landlord and tenant—Rent restriction—Dwelling-house outside Acts—Part sub-let to weekly tenant—Head lease determined by surrender—Notice to quit served on weekly tenant of part of premises—Notice expires two days after determination of head lease—Weekly tenant not entitled to protection of the Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 3 *—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3*—R. S. C. Order* 14.

A company, the yearly tenants of a dwelling-house which was outside the scope of the Rent Restriction Acts, had sub-let a part of the premises, of such a rateable value as to lie within the Acts, to the defendant on a weekly tenancy. The company's tenancy could only be determined by six months' notice expiring on September 29 in any year. The landlord gave to the company six month's notice to quit expiring on June 24, 1948. The company accepted that notice and on that date gave up possession of the demised premises with the exception of the part sub-let to the defendant. The company on June 14, 1948, had given the defendant notice to quit expiring on June 26. The defendant having refused to deliver possession of the part of the premises sub-let to him, the landlord by specially endorsed writ under Or. 14, claimed possession. The defendant sought leave to defend the action on the ground that if on June 24 the head lease was determined, he then became, for the remaining two days of his weekly tenancy, a direct tenant of the plaintiff, the head landlord, of premises within the scope of the Rent Restriction Acts. Pritchard J. gave the landlord leave to sign final judgment for possession. The defendant appealed.

Held, dismissing the appeal, that the dwelling-house, the subject of the original demise, not being a dwelling-house to which the Rent Restriction Acts applied, s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, did not apply to the sub-tenancy of a part of the premises so as to protect a sub-tenant from ejectment. On the determination of his sub-tenancy the defendant became at common law a trespasser. Section 15, sub-s. 3 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, under which (where the interest of a tenant of a dwelling-house to which the Act applied was determined) any sub-tenant to whom any part of the premises had been lawfully sub-let was to be deemed to have become the tenant of the head landlord, only applied to the case where the head tenant, whose tenancy had been determined, was tenant of a dwelling-house to which the Acts applied. The defendant accordingly was not entitled to the protection of the Rent Restriction Acts: *Wright and Bowers* v. *Arnold* [1947] K. B. 280 considered.

Where a plaintiff claimed possession by specially endorsed writ under Or. 14, the fact that a defendant relied on the Rent Restriction Acts was not of itself enough to entitle him to leave to defend.

Appeal from Pritchard J.

The plaintiff, Noel Cow, by specially endorsed writ under R. S. C., Or. 14, claimed against the defendant A. R. Casey possession of flat No. 1, being part of certain premises known as Carfax situate at St. George's Hill, Weybridge, which the plaintiff had by a lease, dated September 3, 1946, demised for a term of years which had since determined. Pritchard J., confirming the order of the master, gave the plaintiff leave to sign final judgment for possession. The defendant appealed. The facts are sufficiently stated in the headnote and in the judgment of Lord Greene M.R.

Lionel A. Blundell for the defendant. The defendant ought to be given leave to defend himself against the proceedings brought under Or. 14. The plaintiff's case is that the defendant is a trespasser because he, as a sub-tenant, remained in possession of his flat after the head tenants of the whole premises, had given up possession on notice to quit. The point arises as to the date on which the yearly head tenancy could be determined. The notice to quit given to the tenants clearly ended on the wrong quarter day: see *Croft* v. *William F. Blay, Ld.* (1) which was a case of a holding over where it was decided that the yearly tenancy could only be terminated at the end of the successive years. If that be so, the plaintiff is in the difficulty that the notice to the tenants was bad and that the sub-tenant continues to be validly in possession of the flat. It is true that the tenants vacated the part of the premises not occupied by the defendant on the date for which notice to quit was given. This was not a sufficient delivery up of possession for an inference to be drawn therefrom of an implied surrender, but, if there was a surrender, it must have been made subject to the sub-tenancy. It follows that the plaintiff fails to show a right to eject the sub-tenant who could, in any case, claim to stay on as statutory tenant under the Rent Restriction Acts. [He was stopped.]

Heathcote-Williams for the plaintiff. The defendant has not put forward any reasonable grounds of defence, for there is no evidence that the tenancy was not duly determined. It has been held that a yearly tenancy can be determined at any time: *H. & G. Simonds* v. *Heyward* (2). In the present case the notice to quit was acted on. The court is asked to presume that what was done, was rightly done. In any case there was a

(1) [1919] 2 Ch. 343.

(2) [1948] 1 All E. R. 260.

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surrender of the head tenancy and there is no ground for saying that the sub-tenant has any greater right because of this. Nor can the sub-tenant claim to retain possession under the Rent Restriction Acts having regard to s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for the tenancy of the head tenants was not of a nature to come within the Acts. That is the only section of these Acts fixing the rights of a sub-tenant: *Wright and Bowers* v. *Arnold* (1). The appeal should therefore fail.

Lionel A. Blundell in reply. If the head tenancy did terminate on June 24, 1948, it must have been by surrender and at that date the defendant as sub-tenant had two more days of his weekly tenancy to run and during those days he became the tenant of the head landlord of his part of the house and entitled to rely on s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (2). The position at common law, prior to the coming into operation of these Acts, was that, where a head tenant had sub-let, on the expiration of the head tenancy a sub-tenant had no right to hold over. Where, however, the head tenancy came to an end by surrender before the determination of the sub-tenancy, the sub-tenant became the direct tenant of the head landlord. The result is that on June 24 the defendant as sub-tenant became the direct tenant of a dwelling-house to which the Rent Restrictions Acts applied under the plaintiffs, the head landlord. It was not until June 26 that the plaintiffs could claim possession. Then s. 3 of the Act of 1933 protected the defendant; s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (3) has no application to this case, nor has the decision in *Wright and Bowers* v. *Arnold* (1). The defendant has a good defence to the action and is entitled to be heard. The procedure of Or. 14 should not be used to shut out a tenant's defence in a case such as this where the tenant has a strong case and a difficult point of law arises.

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(1) [1947] K. B. 280.

(2) The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, sub-s. 1: "No "order or judgment for the "recovery of possession of any "dwelling-house to which the "principal Acts apply or for the "ejectment of a tenant therefrom "shall be made or given unless" the conditions laid down in the Acts are fulfilled.

(3) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, sub-s. 3: "Where the interest of a tenant of "a dwelling-house to which the "Act applies is determined, either "as the result of an order or "judgment for possession or eject-"ment, or for any other reason, "any sub-tenant to whom the "premises or any part thereof "have been lawfully sub-let shall, "subject to the provisions of this "Act, be deemed to become the "tenant of the landlord on the "same terms as he would have "held from the tenant if the "tenancy had continued."

(3) [1947] K. B. 280.

Lord Greene M.R. This is an appeal from an order of Pritchard J., confirming an order of Master Horridge, giving leave to the plaintiff to sign final judgment for possession with mesne profits. The appellant says that he ought to have been given leave to defend, and he says that he has a reasonably arguable point of defence.

The premises in question consist of a flat known as No. 1, in a house called Carfax, situate at St. George's Hill, Weybridge. That house was demised by the plaintiff to a company called Saunders-Roe, Ld. on September 3, 1942, for a term of three years from September 29, 1942. It was a house well outside the Rent Restriction Acts. The tenants on the expiration of the term held over as yearly tenants, and in 1944 they assigned their yearly tenancy to Fairey Aviation, Ld. That assignment I take to have been a permitted assignment, because no suggestion appears that it was in breach of a covenant contained in the lease against assigning or under-letting the whole or any part of the premises. The yearly tenancy constituted by the holding over of the then tenant ran, apparently, from September 29, and it is said (and when discussing it I am, for the purposes of this case, accepting it) that the only method of determining that tenancy was by a six months' notice expiring on September 29. In point of fact, the plaintiff, on December 23, 1947, served on the Fairey Aviation, Ld., a notice to quit which was stated to expire on June 24, 1948. There again, I am accepting, for the purposes of this case, the argument that that notice was, in itself, a bad notice, and, unless accepted as a good notice by the tenant, would not have resulted in the determination of the yearly tenancy. In point of fact, the tenant accepted and went out of the house, subject to what I am going to say in a moment about this present appellant, on June 24. The only possible inference from the facts is that Fairey Aviation, Ld. accepted that notice as a good notice. In law, if the notice was a bad one, the position quite clearly was that the tenancy was surrendered. They went out of possession and the present plaintiff is seeking to obtain possession of the entire house. That is the only inference that can be drawn from the evidence.

If that had been all there was in the case, of course, this question would not have arisen, but the present appellant was, in fact, at that time in occupation of part of the house known as flat No. 1. It appears that that flat No. 1 taken by itself, would be a dwelling-house falling within the Rent Restriction Acts, so far as its value or rateability was concerned. On that footing the appellant claims to be allowed to remain there as a statutory tenant. It would appear that as an employee of the Fairey Aviation, Ld., at the time that he went into occupation he was a member of a class of assignees or sub-lessees permitted by the covenant against assigning or sub-letting, and we must take it that he was there without involving any breach of covenant. The manner in which he got there was this. The Fairey Aviation, Ld. gave him a weekly tenancy. I should, perhaps, have added that he has ceased for some time to be in the employment of Fairey Aviation, Ld., who appear to have gone away from the neighbourhood. He was given, as I have said, a weekly tenancy at 30*s.* a week. Obviously, Fairey Aviation, Ld. having accepted the notice to quit and having gone out, and thereby a surrender having taken place, it fell on them to get the appellant out so as to be able to deliver vacant possession. On June 14, 1948, that is ten days before the expiration of the notice to quit which the plaintiff had served on the company, the company served on the present appellant a notice to quit on June 26, that is to say, two days after the plaintiff's notice to the company was timed to expire and two days later than the date on which the company, in fact, gave up possession of the house. The fact that the head tenancy was surrendered on June 24, at a time when the sub-tenant, the appellant, was in occupation, produces the result that there was running at the time a valid notice to quit served upon him. Accordingly, his sub-tenancy had two days to run as from the date of surrender of the head tenancy. The surrender of the head tenancy could not deprive the appellant of the right to those two days at the fag-end of his contractual sub-tenancy, and the notice on him admittedly was not in any way invalidated by the surrender; he held those two days subject to the running of that notice.

The appellant argues that the effect of his sub-tenancy was this, that on the surrender of the head lease he became in direct relations with the plaintiff as head lessor. He became accordingly, according to the argument, on June 24 a tenant of the plaintiff in occupation with two days of his contractual

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tenancy to run. That, he says, entitled him to claim against the plaintiff the protection of the Rent Restriction Acts, his flat being, as I have said, one which was clearly within the scope of the Acts. In my opinion, that argument is completely misconceived. At common law it is perfectly true he had two days' occupation which he was entitled to keep as against the superior landlord. On the expiration of those two days, at common law he became a trespasser. The notice which had been served on him expired at the end of those two days. He therefore became at common law a trespasser. What possible ground is there for his claiming the protection of the Rent Restriction Acts?

The appellant says that s. 3, sub-s. 1, of the Act of 1933, protects him. That section is the main operational section, so to speak, of the Rent Restriction Acts, and says: "No order "or judgment for the recovery of possession of any "dwelling-house to which the principal Acts apply or for the "ejectment of a tenant therefrom shall be made or given "unless," and then it sets out the well-known conditions.

"Now," says Mr. Blundell, "this is a dwelling-house to "which the principal Acts apply. What is being sought "against me is an order or judgment for the recovery of "possession of that dwelling-house. Therefore, I am entitled "to say it is not open to the court to make such an order by "virtue of this section." That appears to me to be a complete misconception of the true position. It is quite true what is being asked for in this action is recovery of possession of part of the dwelling-house "Carfax" which was demised by the plaintiff. That dwelling-house "Carfax" is not a dwelling-house to which the principal Acts apply. It is a mere accident that only part of that dwelling-house happens to be occupied, the reason being that the tenant of the rest has moved out. Test the matter in this way. Suppose the head tenant had surrendered by deed, and afterwards said: "Well, I am not "going to move out," and an action had to be brought to eject him. That would have been an action against a head tenant and his sub-tenant, both as defendants, for the recovery of possession of the house "Carfax," which is not a dwelling-house to which the principal Act applies. In that case s. 3 of the Act would have had nothing in the world to do with the case. It cannot possibly make any difference that the head tenant does not happen to be a necessary defendant because he has himself vacated the house. What the plaintiff is trying to do is to get possession of his house "Carfax," and sitting in a corner of it is a person who, at common law, is a pure trespasser. It seems to me impossible to suggest in those circumstances that s. 3 applies.

I am not sure whether reliance is placed on s. 15, sub-s. 3 of the Act of 1920 which does deal with the case of sub-tenancies, but, in my opinion, it is impossible to rely on that section. It deals with the case of a tenant, whom I will call the head tenant, whose tenancy is determined either as the result of an order or judgment for possession or ejectment, or for any other reason. It would cover, therefore, quite clearly the case where the head tenancy is determined by a surrender. But the sub-section is limited to a case where the tenant whose tenancy is determined, that is to say, the head tenant, is tenant of a dwelling-house to which the Act applies. I should have thought that is clearly what the Act means. The company was not a tenant of a dwelling-house to which the Act applies; it was tenant of a dwelling-house to which the Act did not apply, and the fact that they had granted a sub-tenancy of this flat could not alter that circumstance.

The matter is not apart from authority, because in the case of *Wright* v. *Arnold* (1) this court had to consider a question as to the position of a sub-tenant under that sub-section where the sub-tenant was the assignee or sub-tenant of a part of a house which itself did not fall within the Act. In that case I think the head tenancy came to an end by notice; anyhow, it was not a case of surrender. That distinction makes not the slightest difference. It was clearly said in that case that the true meaning of sub-s. 3 is what I have stated it to be, that it only applies where the head tenant is tenant of a house to which the Act applies. If that was not the case, the position would be fantastic. It would simply mean that the tenant of a house to which the Act did not apply could grant a sub-tenancy of a part and then, his own tenancy having been brought to an end, could leave the landlord saddled with a statutory sub-tenant; in other words, it would put the head tenant in a position to foist upon the head landlord a statutory tenant by carving out of the house demised to him a small portion and sub-letting it. Sub-section 3 permits nothing of the kind, in my opinion.

The result, therefore, is that the appellant is a trespasser at common law, as two days, the fag-end of his weekly tenancy,

(1) [1947] K. B. 280.

had expired long before the writ was issued. He was a pure trespasser and there is nothing in the Rent Restriction Acts in those circumstances which can give him protection.

It was said by Mr. Blundell that a Rent Restriction case is one which, at any rate, the court ought to be very cautious in treating under Or. 14. I am disposed to agree with him, for this reason; not that possession cases deserve any different treatment from that of any other case under Or. 14. That order, in the view that I have taken of it (and I think the court has always taken of it), is a very stringent procedure because it shuts the door of the court to the defendant. The jurisdiction ought only to be exercised in proper cases. If the Rent Restriction Acts come into an Or. 14 case, no greater attention in principle is to be given by the court to that class of action than to any other class of action. The only point is, that, as everybody knows, the Rent Restriction Acts are complicated Acts. They contain a number of difficult matters and there are a number of authorities decided upon them. But it is not sufficient under an Or. 14 case to flourish the title of the Increase of Rent Restriction Acts in the face of the court and say that is enough to give leave to defend. If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the court has precisely the same duty under Or. 14 as it has in any other case. It may take a little longer to understand the point and to be quite sure that one has seen all round it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the court is satisfied that it is really unarguable, the court has the duty to apply the rule, and, in my opinion, the master was perfectly right, the judge was perfectly right, and the appeal should be dismissed.

WYNN-PARRY J. I agree with everything which has fallen from the Master of the Rolls. I would only add that in my view the lack of any basis in law in the appellant's case is only equalled by his lack of merit which, on the evidence, is quite clear.

Appeal dismissed.

Solicitors: *Rising & Ravenscroft, for Sherwood, Cobbing & Williams, Kingston-upon-Thames; H. C. Morris, Woolsey, Morris & Kennedy.*

B. A. B.

Affirmed. H.L. [1950] 1 All E.R. 728.

Affirmed. [1950] A. C. 327

C. A.

BOISSEVAIN *v.* WEIL

1948
Dec. 10, 13.

Tucker, Asquith and Denning L.JJ.

Currency (control of)—Loan of foreign currency—Promise to repay in sterling after the war—Parties involuntarily resident in foreign country in military occupation of enemy—Repudiation of transaction by borrower—Illegality of loan—Defence (Finance) Regulations, 1939 (*St. R. & O.* 1939, *No.* 1620), *reg.* 2 (1.), *as amended by Order of* 1940, *No.* 1484—*Emergency Powers (Defence) Act,* 1939 (2 & 3 *Geo.* 6, *c.* 62), *s.* 3, *sub-s.* 1 (*b*).

The plaintiff, a male Dutch subject, and the defendant, a female British subject, were at all material times, by reason of the war, involuntarily resident in Monaco, which was in military occupation of the enemy. In June and July, 1944, the defendant borrowed from the plaintiff, in three equal sums, 960,000 francs, which it was agreed should be repaid in England in sterling after the war. The defendant drew cheques in blank for the amount of the loan on an English bank and addressed a letter to the manager of the bank informing him of the circumstances of the loan and requesting him to honour the cheques in sterling on presentation or as soon as the law permitted. The defendant had not an account at the particular bank and failing to obtain repayment of the loan the plaintiff brought the present action to recover 6,000*l.* and interest. The trial judge found for the plaintiff. On appeal by the defendant:—

Held, that the transaction was prohibited by reg. 2 (1) of the Defence (Finance) Regulations, 1939, as amended by Order No. 1484 of 1940, which, having regard to the Emergency Powers (Defence) Act, 1939, s. 3, sub-s. 1 (*b*) had extra-territorial force and applied to any British subject, wherever he might be (except in one of the excepted territories), who bought or borrowed any foreign currency from any person not being an authorized dealer; that the proper law of the contract in question was English law and since it was illegal by that law it could not be enforced either by action on the loan or on the cheques, or by an action for money had and received.

Decision of Croom-Johnson J. [1948] W. N. 181 reversed.

Observations of Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe Barbour, Ld.* [1943] A. C. 63; distinguished.

APPEAL from Croom-Johnson J.

Action by the plaintiff Boissevain to recover from the defendant the sum of 6,000*l.*, money lent by the plaintiff to the defendant, and interest thereon.

The plaintiff, a male Dutch subject, and the defendant, a female British subject, were at all material times, by reason of the war, involuntarily resident in Monaco, which was then in the military occupation of the enemy. In June and July, 1944, the defendant borrowed from the plaintiff three sums of 320,000 francs, which she agreed to repay in England in sterling at the agreed exchange rate of 160 francs to the pound after the war. Certain documents were entered into for the purpose of carrying out the transaction and the defendant besides drawing cheques in blank on an English bank for the full amount borrowed, addressed a letter to the manager of the said bank informing him of the circumstances in which the cheques had been drawn and requesting him to honour them on presentation or as soon as the law permitted.

The plaintiff, being unable to obtain repayment of the loan, the defendant having no account at the particular bank, brought the present action, which came before Croom-Johnson J. in April, 1948, when that learned judge gave judgment for the plaintiff. He found that the transactions were not illegal under the law of Monaco and said he could not find that the English common law prevented a British subject, involuntarily residing in enemy-occupied territory, from lawfully making such contracts with someone who was not an enemy. The enemy could not have thereby been assisted. In his opinion these transactions did not constitute trading with the enemy, nor were they within the mischief of reg. 2 of the Defence (Finance) Regulations, 1939, as amended.

The defendant appealed, her appeal being confined to the question whether the transactions were illegal as being contrary to the Defence (Finance) Regulations, 1939 (1), as amended on August 15, 1940, and s. 3, sub-s. 1 (*b*) of the Emergency Powers (Defence) Act, 1939.(1)

(1) Defence (Finance) Regulations, 1939, reg. 2, as amended: "(1.) Except with "permission granted by or on "behalf of the Treasury, no "person other than an authorized "dealer shall buy or borrow any "foreign currency or any gold "from, or lend or sell any foreign "currency or any gold to, any "person not being an authorized "dealer."

The Emergency Powers (Defence) Act, 1939, s. 3, sub-s. 1, provides: "Unless the contrary "intention appears therefrom, "any provisions contained in, "or having effect under, any "Defence Regulation shall . . . . "(*b*) in so far as they impose "prohibitions, restrictions or "obligations on persons, apply "(subject to the preceding provisions of this subsection) to all "persons in the United Kingdom "and all persons on board any "British ship or aircraft, not being "a dominion ship or aircraft, and "to all other persons being British "subjects except persons in any "of the following countries or "territories, that is to say (i.) a "Dominion, (ii.) India, Burma "and Southern Rhodesia, (iii.) any

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Salmon K.C. and *Stenham* for defendant.

Sir D. Maxwell Fyfe K.C. and *B. M. Goodman* for the plaintiff.

Tucker L.J. A number of defences were raised at the trial. It was contended that the transaction was prohibited by the Trading with the Enemy Act, and also that the transaction was illegal according to the law of Monaco. The learned judge below dealt fully with both those defences, and they have been expressly abandoned by Mr. Salmon on this appeal. He confined his appeal to two points: He relies on two of the Defence Regulations of 1939, and he says that this transaction is prohibited under one or both of those regulations. The first is reg. 2, of the Defence (Finance) Regulation, but, before reading it in its present form, I will read it in the form in which it was prior to the amendment which was made by Ord. No. 1484 on August 15, 1940. Before that date, it read as follows: "Except with permission granted by or on behalf "of the Treasury, no person other than an authorized dealer, "shall in the United Kingdom buy or borrow any foreign "currency or any gold from, or lend or sell any foreign "currency or any gold to, any person not being an authorized "dealer." By the amending order in 1940, the words "in "the United Kingdom" are omitted, and the regulation now reads: "Except with permission granted by or on behalf of "the Treasury, no person other than an authorized dealer "shall buy or borrow any foreign currency or any gold from, "or lend or sell any foreign currency or any gold to, any "person not being an authorized dealer." By s. 3 of the Emergency Powers (Defence) Act, 1939, unless the contrary intention appears, these regulations apply to all British subjects, wherever they may be, except in those specified territories. Looking at this reg. 2, the result appears to me to be that, as it was originally worded, unless a contrary intention is to be found from a perusal of that regulation, it must be construed as reading as follows: "Except with "permission granted by or on behalf of the Treasury, no "British subject, wherever he may be, except in one of the "excepted territories, shall in the United Kingdom buy or

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"country or territory to which "any provisions of this Act "can be extended by Order in "Council, and (iv.) any other "country or territory under His "Majesty's protection or "suzerainty."

"borrow any foreign currency . . . ." that is to say, it would prohibit a British subject in America from buying or borrowing foreign currency in the United Kingdom, which, of course, he could do through an agent or by instructions by mail or otherwise. Then comes the amendment of August 15, 1940, in which the words "in the United Kingdom" are omitted. Having regard to s. 3 of the Emergency Powers (Defence) Act, 1939, the result appears to be that the regulation now applies to any British subject, wherever he may be, other than in one of the excepted territories, who buys or borrows foreign currency anywhere. Is there a contrary intention to be found in the regulation? I am unable to find any indication of any intention to the contrary. The whole object of the regulation appears to me to be to protect sterling and to be expressly aimed at, or expressly to include, transactions carried out in foreign countries by British subjects, as well as transactions carried out by British subjects in the United Kingdom. I am therefore unable to accept the first and widest submission of Sir David Maxwell Fyfe, namely, that, on the proper construction, this regulation has no extra-territorial effect.

But Sir David advanced a second argument to this effect: that, even if it has extra-territorial force, it should not be applied to transactions in enemy-occupied territory between two persons, both of whom, for the purposes of trading with the enemy, are to be regarded as enemies. And, he says, it would be absurd to suppose that transactions in a foreign currency in an occupied country, between two persons who are involuntarily detained there, should come within the scope of this regulation. He fortifies that argument by pointing out that the regulation contemplates obtaining consent from the Treasury, and that it only applies to persons other than authorized dealers. Sir David therefore submits that the regulation should only be construed as applying to territories in which it is possible to obtain a consent of the Treasury, or in which it is reasonable to contemplate the existence, or access to, an authorized dealer. I think there are several answers to that submission. One is that the regulation, in its terms, is wide enough to cover all foreign countries, and that if it had been intended to exclude certain specified countries, namely, countries under enemy occupation, or countries which were included under the Trading with the Enemy Act, it would have been easy and natural so to do. I think there is a further difficulty, namely, that the mere fact that a person may be in an enemy-occupied country does not necessarily preclude the possibility of some communication, through some channels, with the Treasury in this country. It is to be noted that the Trading with the Enemy Act, 1939—as pointed out to us by Mr. Salmon—in the proviso to s. 1, says: "Provided that a person shall not be deemed to "have traded with the enemy by reason only that he has "(i.) done anything under an authority given generally or "specially by, or by any person authorized in that behalf by, "a Secretary of State, the Treasury or the Board of Trade ". . . ." As has been pointed out by my brother Denning, it appears from the correspondence in this case that, at any rate in the year 1942, the lady was able to be in communication with her solicitors in this country. With regard to the position of Monaco, the evidence given before the learned judge as to the nature and extent of the enemy occupation was not very specific. It appeared that it was under military occupation of the enemy, but the civil administration was apparently functioning normally, and the mere fact that Monaco was brought within the scope of the Trading with the Enemy Act by reg. No. 1476/40, made on August 13, 1940, would not, in my view, by itself, be sufficient to take it out of reg. 2 of the Defence (Finance) Act. I feel unable to attach this limited construction to reg. 2, and to read into it an exception applying either to foreign enemy-occupied countries, or countries which are treated as enemy countries for the purpose of the Trading with the Enemy Act.

Those were the two main arguments advanced by Sir David Maxwell Fyfe for his contention that this regulation did not apply, but he also used the ad absurdum contention and said that, if the regulation were to be construed literally, it would apply to a British subject permanently resident in America, who, for a few days, had occasion to borrow some dollars from a friend. With regard to that, it is sufficient to say—without expressing a concluded opinion on this matter—that I am by no means satisfied that a transaction of that kind would come within the language of "buying or borrowing foreign "currency." The transaction with which we are concerned is one of the kind with which I think these regulations were designed to deal, that is to say, a transaction in which a British subject borrows francs and undertakes to repay in sterling. That is, I think, clearly a buying or borrowing of foreign currency within the meaning of the regulation and that is the kind of transaction aimed at. Whether or not the other transaction, which I think is clearly not one at which the regulation is aimed, may or might come within this language it is not necessary to decide. I am not impressed by the argumentum ad absurdum.

Finally Sir David alternatively argued that if this transaction is hit by reg. 2 none the less the plaintiff ought to be entitled to recover on the principle of unjust enrichment and he referred to and relies on the speech of Lord Wright in the *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe Barbour Ld.* (1) where in dealing with the doctrine of unjust enrichment the noble and learned Lord says : " The gist of the action " is a debt or obligation implied or more accurately imposed " by law in much the same way as the law enforces as a debt " the obligation to pay a statutory or customary impost." It must be remembered that in that case Lord Wright was dealing with a contract lawful when made but the performance of which had become impossible and the consideration for which had accordingly failed. But it is said that the transaction in the present case comes within the language which was there used in dealing with this kind of action and that it should be applied in the present circumstances. It is to be observed that in the present action there is no claim whatever based upon fraud or tort, or any alternative claim grounded on any implied obligation imposed by law or otherwise, and if, as I think, this transaction was one forbidden by reg. 2, and binding on a British subject abroad, it would—as Mr. Salmon very forcibly says—be a curious result if we were compelled to say that the law imposed a debt or obligation which had been expressly prohibited by a statutory enactment to which this court is bound to give effect. I think the whole notion of a debt or obligation imposed by law, as contemplated by Lord Wright in the *Fibrosa* case (1), is alien to a transaction of the kind with which we are dealing, where the regulation, which has the force of law, has, in terms, prohibited the particular transaction. For those reasons I think Sir David's alternative contention fails. In this connexion, it is to be observed that when one is considering the law applicable to a transaction of this kind, and whether or not in these courts the plaintiff could enforce his claim in an alternative manner—by claiming repayment in Monaco of the francs that had been lent and by invoking the

(1) [1943] A. C. 32, 61.

law of Monaco as applicable to the transaction—it is necessary to consider what the view of the courts of this country would be with regard to a claim so framed. In that connexion, our attention has been drawn by Mr. Stenham to the language used by Lord Atkinson in *Dynamit Actien-gesellschaft* v. *Rio Tinto Co., Ld.* (1). Lord Atkinson was referring to the case of *Santos* v. *Illidge* (2), and he said: "There an action was "brought against a British subject by a native of Brazil to "recover damages for the non-delivery to the plaintiff in "Brazil of certain slaves living in Brazil and owned by the "defendant and there sold by him to the plaintiff by contract "made in Brazil. The contract was performed in Brazil, and "might be lawfully performed there. The question for decision "was whether, having regard to the time when, the mode in "which, and the purposes for which the slaves were acquired "by the defendant, the holding and sale of them by him was "not made unlawful by the provisions of a certain English "statute binding on the defendant as an English subject, "namely, 6 and 7 Vict., c. 98. The Court of Exchequer "Chamber decided that on the proper construction of the fifth "section of that statute the defendant was not prohibited from "holding and selling these slaves in Brazil, and accordingly the "plaintiff succeeded; but the whole case proceeded on the "basis that had these things been prohibited by this statute "the contract could not have been enforced against the "defendant in an English court, despite the fact that it was "made in Brazil and was to be performed in Brazil, and was "there lawful." I think the present case is a fortiori to that referred to there, because here we have a contract which is not only prohibited by the law of this country, but the performance of which is to take place in this country. I do not think that in any shape or form the courts of this country will lend themselves to the enforcement, directly or indirectly, of the contract which was proved in the present case.

For these reasons I think this appeal succeeds. I should add that I have not found it necessary to refer to Mr. Salmon's argument with regard to reg. 3 (*c*) of the Defence (Finance) Regulations. It is sufficient for me to say that I think there is a great deal to be said for the contention of Sir David Maxwell Fyfe that reg. 3 (*c*) is not applicable to the present case. The language in reg. 3 (*c*) relied upon is this: "Subject to any "exemptions which may be granted by order of the Treasury,

(1) [1918] A. C. 260.

(2) (1860) 8 C. B. (N. S.) 861.

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"no person shall, except with permission granted by or on "behalf of the Treasury, acknowledge any debt in favour of "a person who is resident outside the sterling area." The argument is that this present action is founded on a contract creating a debt and not on an acknowledgment of some pre-existing debt, but it is unnecessary to express a concluded view with regard to that regulation, because I think that reg. 2 is the one that is fatal to the plaintiff's claim.

ASQUITH L.J. I am in agreement with the judgment which my Lord has just delivered and I cannot usefully add to it.

DENNING L.J. The regulations here in question were made during the war for the protection of our purchasing power. All the foreign assets of the people resident in this country were mobilized to form a pool, which was used for purchases abroad. There were, of course, big demands on this pool for essential purchases, such as to pay for necessary imports, and the country could not afford to allow it to be used for any other than essential purposes. The country could not, therefore, allow British subjects unrestricted freedom to deal in foreign exchange or to buy goods or services from foreign countries, for that would give foreigners sterling credits and increase the demands on the pool. Section 3 of the Emergency Powers (Defence) Act, 1939, makes it plain that these regs. 2 and 3 (*c*), apply to British subjects in foreign countries, unless the contrary intention appears from the regulations themselves. I can find no such contrary intention. If the regulations were not to apply to British subjects in foreign countries, it would mean that any British subject who went on a visit to the United States could freely buy dollars and give sterling cheques in exchange—or promise to repay in sterling in London—and thus create a drain on sterling for non-essential purposes. The sterling credits could be used by Americans for their purposes here, instead of bringing here goods or dollars which would strengthen the pool. Again, if the regulations were not to apply to British subjects in enemy occupied territories, it would mean that any British subject in the south of France during the war could freely buy francs and create in exchange sterling credits which might be transferred to the enemy and used against this country in the war, or transferred to a neutral country and increase the pressure on sterling.

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I cannot agree, therefore, with either of the suggested limitations as to the scope of regs. 2 and 3 (*c*). The principal argument against their application here was the argumentum ad absurdum. It is said that it is unthinkable that a British subject long resident in, say, the United States, should not be able to buy or borrow dollars and pay for them with a cheque on his New York bank in dollars, or that a British prisoner of war should not be able to borrow foreign currency on which to live during his escape through enemy-occupied territory. Those cases are, however, very different from the present case, because they do not involve the creation of any sterling credit. The proper law of the contracts in those cases is not English law. According to private international law, when a British subject who is residing in the United States borrows dollars from an American, the validity of the contract to repay—that is to say, the question whether it creates legal obligations or not—depends on the proper law of the contract; and that depends not so much on the place where it is made, nor even on the intention of the parties, or on the place where it is to be performed, but on the place with which it has the most substantial connexion. (See Westlake, 7th ed., p. 302, and Prof. Cheshire's recent book on International Contracts especially at pp. 12–15, 30–33). If in the case put he promises to repay in dollars in the United States, the proper law of the contract is the law of the United States, and its validity in no way depends on what the British Defence Regulations may say. If, however, he promises to repay in sterling in the United Kingdom, the proper law of the contract is the law of this country; and its validity depends on whether it is made illegal by the Defence Regulations. If it is illegal by the law of England, it is, or should be, invalid everywhere.

In construing the Defence Regulations, it must be assumed that, in so far as they have extra-territorial effect on the validity of contracts, they apply only to contracts of which the proper law is the law of England, for those are the only contracts whose validity they can affect, and not to contracts of which the proper law is the law of some other country, whose validity they do not affect.

I need hardly say that a British subject cannot contract out of the Defence Regulations. If, for instance, when on a visit to the United States, he makes a contract to borrow dollars and to repay in sterling in the United Kingdom, the proper law of the contract is the law of England and he cannot escape the effect of that law by stipulating in the contract that it is governed by the law of the United States. Notwithstanding what was said in *Vita Food Products* v. *Unus Shipping Co.* (1), I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account. If, however, a British subject resident in the United States makes a contract to borrow dollars and to repay there in dollars, the proper law of the contract is the law of the United States: and, if it is valid in the United States, it is, or should be, valid everywhere. Nevertheless, although it is valid and would be enforced in the United States, it is quite another matter to say that it would be enforced in this country. The validity of the contract is one thing and the enforcement of it is another. Then the public policy of the lex fori may come into play. An English court, whilst recognizing that the contract was valid, would yet have to face the fact that a British subject is not allowed to make a payment to any person resident outside the sterling area without the consent of the Treasury. So, also, cases might occur where English law clearly prohibited a British subject from entering into a foreign contract which was valid by its proper law, in which case, of course, it would not be enforced by the English courts. I need not, however, go into those matters in detail. Suffice to say that the regulations do not affect innocent transactions, such as those instanced in argument, because when the contract is valid by its proper law and the only question is payment, the Treasury would no doubt in any proper case grant the necessary permission to make payment. In my opinion, therefore, the argumentum ad absurdum is not valid, because, on the view of the regulations which I have expressed, there is nothing unreasonable in them.

In this case, the proper law of the contract is English law. Having regard to the nationality and domicile of the defendant, to the detailed arrangements for the repayment of the loan in London, and to the circumstances which gave rise to the transaction, there can be no doubt that England was the country with which the transaction was most essentially connected, and that therefore English law was the proper law. The only connexion with Monaco was that it happened to

(1) [1939] A. C. 277, 290.

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have been made there. It is illegal by English law, and cannot be enforced either directly by action on the loan or the cheques, or indirectly by an action for money had and received. I agree that this appeal should be allowed.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors for plaintiff: *Wm. Chas. Crocker.*
Solicitors for defendant: *Pettiver & Pearkes.*

A. W. G.

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Jan. 28, 31; *Feb.* 1.
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HAIN STEAMSHIP COMPANY LIMITED *v.* THE MINISTER OF FOOD.

Shipping — Freight — Demurrage — Charterparty — " Centrocon "— Construction—Cargo, part specified, part optional—Combined cargo less than deadweight capacity of ship for wheat in bags—Freight payable on steamer's deadweight capacity—" Steamer not to earn " more freight than she would if loaded with a full cargo of wheat " in bags "—Expenses of discharging—Saving on unloaded cargo—Whether deductible from freight—Calculation of lay days—Chamber of Shipping (River Plate) Charterparty, 1914, *Homewards, cll.* 6, 13, 25.

A charter-party in the form of the Chamber of Shipping (River Plate) Charter-party, 1914, Homewards, for the carriage of a full and complete cargo of wheat, maize and rye from the River Plate to the United Kingdom provided by cl. 6: " Charterers have the " option of shipping other lawful merchandise, cotton, sugar, " quebracho wood, quebracho extract and distillery residue " excluded, in which case freight to be paid upon steamer's dead " weight capacity for wheat in bags on this voyage at the rate " above agreed on for heavy grain, but steamer not to earn more " freight than she would if loaded with a full cargo of wheat in " bags. This option can only be used if the quantity of other " lawful merchandise as above shall amount to not less than " 200 tons. All extra expenses in loading and discharging such " merchandise over heavy grain to be paid by charterers . . . ."

Clauses 13 and 25 provided that cargo should be loaded and delivered at the rate of so many tons per day.

The charterers in fact loaded a cargo of maize in bulk, linseed in bags and pollards in bags, of a total weight of 8,858 tons, which was 579 tons short of the vessel's deadweight capacity of 9,437 tons for wheat in bags. Disputes arose between the parties as to whether (1.) freight was payable under cl. 6 on the full deadweight capacity of the ship for wheat in bags, less only a deduction of 0·75 per cent. for shrinkage on the voyage, or whether, as the charterers contended, a sum was also to be deducted which represented the saving of expense to the shipowners by reason of the 579 tons not shipped not having to be discharged, and (2.) whether the lay days were to be calculated, as the charterers contended, on the basis of the ship's deadweight capacity or, as the shipowners contended, on the basis of the cargo actually loaded and delivered.

Held, that the shipowners were entitled to the full freight on the dead-weight capacity of the ship for wheat in bags, without deduction other than for shrinkage, and that the lay days were to be calculated on the actual cargo loaded and delivered.

Per TUCKER L.J.: If it had been intended to produce the result that where optional cargo was shipped but the vessel was not loaded down to her marks and therefore there was a saving of expense by the shipowners in the loading and unloading of the cargo, there should be a reduction of the freight payable, it would have been easy to say so. It has been argued that a distinction is to be drawn between the words "freight to be paid" and "steamer not to earn more freight" in cl. 6. Such a distinction cannot properly be drawn. It would amount to saying that the language of the clause means "but in such an event the ship-"owners are not to make any greater profit out of the adventure "than they would make if the contemplated cargo had been "shipped." Freight is the remuneration to which the shipowner is entitled on the performance of his obligations under the charter-party—a sum which has no relation to the profits which he may make or to the expenses which he may incur in order to earn the freight.

APPEAL from Sellers J.

Award in the form of a special case stated by an umpire.

The Hain Steamship Co., as owners of the motor vessel *Trevose*, claimed freight and demurrage against the Minister of Food, as charterer of the vessel, under a charterparty dated October 13, 1946, in the form "Chamber of Shipping (River "Plate) Charter Party, 1914, Homewards," the code name of which is "Centrocon." The relevant clauses of the charter-party were as follows: Clause 2: "The said steamer . . . . "shall. . . . proceed as ordered by the charterers or their "agents to the undermentioned ports or places and there "receive from them a full and complete cargo of wheat and/or "maize and/or rye, in bags and/or in bulk."

Clause 3: "The steamer shall load as follows, viz., at one "or two safe loading ports or places in the River Parana . . . . "and the balance of the cargo in the port of Buenos Ayres, "La Plata or Montevideo at charterers' option . . . ."

Clause 4: "Being so loaded the steamer shall . . . .

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"proceed . . . . to discharge at a safe port in the United "Kingdom . . . . and deliver the cargo . . . . on being "paid freight at the rate hereinafter mentioned."

Clause 5: "81*s*. . . . . per ton for wheat and/or maize "and/or rye . . . . all per ton of 2240 lb. English or 1016 kilos "(gross weight delivered) . . . ."

Clause 6: "Charterers have the option of shipping other "lawful merchandise, cotton, sugar, quebracho wood, quebracho extract and distillery residue excluded, in which "case freight to be paid upon steamer's deadweight capacity "for wheat in bags on this voyage at the rate above agreed "on for heavy grain, but steamer not to earn more freight than "she would if loaded with a full cargo of wheat in bags. "This option can only be used if the quantity of other lawful "merchandise as above shall amount to not less than 200 tons. "All extra expenses in loading and discharging such merchandise over heavy grain to be paid by charterers. "The charterers are to have the full reach and burthen of the "steamer including 'tween and shelter decks, bridges, poop, etc. "(provided same are not occupied by bunker coals and/or "stores)."

Clause 13: "The steamer shall be loaded at the rate of "500 tons per running day, Saturdays after 1 p.m. Sundays "and holidays excepted otherwise demurrage shall be paid "by the charterers as per Clause No. 48 . . . ."

Clause 20: "The freight shall be paid as follows, viz., on "the right and true delivery of the cargo, in cash."

Clause 25: "At destination cargo to be received at the "average rate of not less than 1,000 tons per weather working "day (Sundays and holidays excepted) for bulk cargo, and "at the average rate of not less than 750 tons per weather "working day (Sundays and holidays excepted) for bagged "cargo . . . ."

Clause 41: "Charterers have the option of ordering the "vessel to discharge at two safe ports in the United Kingdom "including Northern Ireland, as follows: (1.) Two ports on "the West coast of United Kingdom . . . . at 2*s*. 6*d*. per "ton extra on the entire cargo . . . ."

Clause 48: "Demurrage in loading and/or discharging to "be at the rate of eightpence per g.r.t. per day, or pro rata "for part of a day."

The cargo loaded in fact consisted of 8,858 tons, made up of maize in bulk, linseed in bags and pollards in bags, which was 579 tons short of the vessel's deadweight capacity of 9,437 tons for wheat in bags.

Disputes having arisen between the parties as to the amount of freight and demurrage due to the shipowners, matters were referred under the arbitration clause to two arbitrators, who, being unable to agree, appointed Mr. C. T. Miller as umpire. The umpire found for the shipowners on both points raised, but stated his award in the form of a special case. He held that the shipowners were entitled to freight at the rate for heavy grain on the deadweight capacity of the vessel for wheat in bags, without deduction other than for shrinkage of cargo on the voyage, and that the lay days had to be calculated on the footing of the cargo actually loaded and delivered, and not, as the charterers contended, on the footing of the deadweight capacity of the ship. On appeal by the charterers Sellers J. agreed with the umpire on the issue of demurrage but disagreed with him on the issue as to freight. He was of opinion that an allowance must be made to the charterer for the discharging expenses saved by the shipowners. In his opinion the charter, and cl. 6 in particular, should be interpreted so that the shipowners were placed in no better position than if they in fact carried wheat in bags instead of the optional cargo.

The shipowners appealed, and the charterers cross-appealed.

Sir R. Aske K.C. and *Mocatta* for shipowners. The decision in this case will affect every ship sailing under this charter. It is submitted that the findings of the umpire were right. The contention of the charterers before the umpire, with regard to the question of freight, was that the words of cl. 6, which provided that in the event of "other lawful merchandise" being shipped, and the vessel not being loaded down to her marks, freight should be paid on the steamer's deadweight capacity for wheat in bags, really meant that freight should only be paid on part of the deadweight capacity, and the rest was to be treated as dead freight or damages. That contention does violence to the plain terms of the charter. If dead freight can be brought into the matter and placed on the footing of damages, then in considering damages all sorts of matters would have to be brought into account. Damages are matters of actual loss by the shipowners in consequence of a breach of contract by the charterer.

[TUCKER L.J. Are you agreed that the real issue is whether the charterers are entitled to deduct from the freight the expenses saved in the discharging of cargo ?]

Sir Wm. McNair K.C. for charterers. Yes, my Lord.

Sir R. Aske K.C. This charter has been in operation for thirty-five years and this is the first time that this question of deducting expenses saved has been raised. The true position is that cl. 6 fixes a sum to be paid for the use of the steamer by the charterer once he has brought that clause into operation by shipping more than 200 tons of optional cargo. Freight is to be paid on the deadweight capacity of the ship. It is contractual freight and is payable irrespective of the particular cargo loaded or the quantity loaded. It is payable for the use of the ship. The charterer is at liberty to ship a full deadweight cargo, though he is not compelled to do so, but whichever course he takes he still has to pay freight based on the full deadweight capacity. If under cl. 2 the charterer does not ship a full and complete cargo, and there is no cl. 6, the shipowner would have a claim for dead freight or damages. The term " dead freight " has never been held to be applicable to cl. 6, which provides for a gross sum for freight and no question of damages arises. Therefore the ground on which the case was argued before the umpire must fail. Before the learned judge the charterers set up another contention, namely, that they were entitled to the benefit of the discharging expenses which the shipowners had been saved. There is no principle in law that if a person has an option under which, if he exercise it, he can put the other party to certain expense, then, if he does not exercise it and the other party is saved that expense, he is entitled to be given credit for the saving. There is nothing in the charter which entitles the charterer to any such right, and to imply such a right would be to import a fresh contract. The learned judge below treats freight as being the net earnings of the shipowner. To do that is to construct a new clause. The correct approach is to consider what the parties have said. In such a charterparty the parties must have appreciated that the option given by cl. 6 to the charterers would in some cases work out greatly to the benefit of the charterers and in others to the advantage of the shipowners.

Sir Wm. McNair K.C. and *H. L. Parker* for charterer. It is submitted that the conclusion at which the learned judge arrived gives a perfectly sound business meaning to cl. 6 and does not involve any violence to the language used, if that language is construed in its context in the charter as a whole. The alleged contentions of the charterer which Sir Robert

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Aske has set up and demolished were never the contentions of the charterer. We certainly used the words dead freight, but merely as a convenient commercial expression for conveying the idea of freight on a parcel not shipped. The charterers' claim is not based on any general principle of law, but on what, it is submitted, is the proper construction of the actual language used by the parties. The crucial point comes down to this: what is the meaning of the words: "Steamer not to "earn more freight than she would if loaded with a full cargo "of wheat in bags"? That sentence defines the maximum freight earnings of the ship, and if it is found that the owners' claim for freight results in their obtaining more than the freight earnings they would have obtained if the ship had been loaded with a full cargo of wheat in bags, then you are entitled to reduce the payment to that figure. There is no difficulty in construing freight earnings as being nett earnings. In cl. 6 there is a clear distinction between gross freight and nett freight. In the sentence above quoted emphasis is laid on "earnings," and in order to arrive at the position of obtaining for the shipowners the same result as if a full cargo of wheat in bags had been loaded you have to deal with both the excess expenses and the saving of expense. The excess expenses are expressly dealt with in the clause, and the saving of expense is dealt with in the limitation of the shipowners' earnings. Clause 6 should be so construed as to produce the same result as would the due fulfilment of the primary obligation under cl. 2.

[SINGLETON L.J. The shipowner has put in the words "all "extra expenses in loading and discharging such merchandise ". . . . to be paid by charterers." It would have been easy to add: "any saving in expenses to be for charterer's benefit."]

That is dealt with by the words: "steamer not to earn more "freight" etc. Unless you apply the limitation clause to the saving of expense due to the ship not having to carry a particular parcel, on which the shipowner gets freight, violence is done to cl. 6 and the shipowner gets more than he would have got if the ship had loaded a full cargo of wheat in bags. A distinction must be drawn between the words "freight to "be paid upon steamer's deadweight capacity" and "steamer "not to earn more freight," etc. The learned judge below, having rightly reached the position that the charter should be interpreted as providing that the shipowner should be in no better position than if a full cargo of wheat in bags had been shipped, has failed to follow that finding to its logical conclusion

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in its application to the demurrage clauses. He accepted the view that the demurrage clauses were wholly independent of the freight clauses. That has an unsatisfactory result. The proper approach, it is submitted, is this: If optional cargo is shipped then the charterer pays and the shipowner receives freight on the basis of a full and complete cargo of wheat in bags. That freight, it is to be assumed, is calculated on the basis of so many days for loading of a full and complete cargo of heavy grain, so many days for a normal passage, and so many days for discharging a full cargo of heavy grain. The number of days occupied by the ship in loading, carrying and discharging is covered by the freight. If you do not give the charterer any time for discharging the notional cargo of 579 tons you in effect give to the shipowner an unfounded benefit.

[Tucker L.J. Do you agree that if the shipowners are right as to the construction of cl. 6 then your claim as to the calculation of demurrage will not arise?]

Yes, my Lord.

Sir Robert Aske K.C. in reply. There can be no conceivable connexion between the freight clause and the demurrage clauses. The demurrage clauses are in the most common form and provide for a minimum rate of loading and discharging. Clause 25 cannot be construed in the way contended for by the charterers without reading into it words which are not there.

Tucker L.J. This is an appeal by the Hain Steamship Co., Ld., who were claimants, against the Minister of Food in arbitration proceedings. Those proceedings arose in connexion with a charterparty—the Chamber of Shipping (River Plate) Charterparty, 1914 (Homewards) — known under the code name of "Centrocon." The dispute primarily concerns the proper interpretation of cl. 6 of that charterparty, and it arose in connexion with a claim by the shipowners for freight. I do not think that it is necessary for me to read more than cl. 6 of the charterparty, and that I shall do in a few moments.

The cargo which was loaded on the ship, a motor vessel named the *Trevose*, consisted of 8,858 tons, made up of four parcels, namely, maize in bulk, linseed in bags (two), and pollards in bags. Under the charterparty wheat, maize and rye in bags was what has been called the contemplated cargo, that is, the cargo which would normally be carried by the ship. The quantity of cargo loaded on the ship was 579 tons short of the vessel's deadweight capacity for wheat in bags, the contemplated cargo, and she was not in fact down to her marks, though fully loaded. The maize was shipped under cl. 2 and the linseed and pollards were shipped under cl. 6, the optional clause, to which I shall refer hereafter. When the cargo was unshipped in this country the pollards and linseed, which were unshipped at Avonmouth and were not weighed on discharge, amounted to 3,155 tons odd, allowing for a shrinkage of ·75 per cent., and the balance of the cargo, which was unshipped at Liverpool and was weighed on discharge, amounted to 2,213 tons odd of maize and 3,427 tons odd of linseed. That made a total, allowing for shrinkage, of 8,796 tons odd, as against the 8,858 tons which had been shipped.

Clause 6 of the charterparty provides as follows: "Charterers "have the option of shipping other lawful merchandise, cotton, "sugar, quebracho wood, quebracho extract and distillery "residue excluded, in which case freight to be paid on steamer's "deadweight capacity for wheat in bags on this voyage at the "rate above agreed for heavy grain, but steamer not to earn "more freight than she would if loaded with a full cargo of "wheat in bags. This option can only be used if the quantity "of other lawful merchandise as above shall amount to not less "than 200 tons. All extra expenses in loading and discharging "such merchandise over heavy grain to be paid by charterers. "The charterers are to have the full reach and burthen of the "steamer, including 'tween and shelter decks, bridges, poop, "etc. (provided same are not occupied by bunker coals and/or "stores)."

In this case, as I have said, the cargo consisted partly of what is called contemplated cargo and partly of what is called optional cargo, optional cargo being cargo shipped pursuant to the option contained in cl. 6 of the charterparty. It is agreed that the rate of freight in this case is 83*s*. 6*d*. per ton, which in the circumstances which existed would have been the rate payable in respect of wheat in bags. The shipowners say that they are entitled to be paid freight in these circumstances arrived at by a simple arithmetical calculation. The cargo loaded did not take the ship down to her marks, and there was a deficiency between the full capacity of the ship, and the load which she in fact carried, of 579 tons. That means that the full deadweight capacity of the ship, calculated in terms of wheat in bags, was 9,437 tons. The shipowners say: All you have to do is to take 9,437 tons, allow for a normal shrinkage of ·75 per cent., and multiply the resulting figure by 83*s*. 6*d*. per ton. That works out at 9,366 odd tons, which multiplied by 83*s*. 6*d*. per ton, gives a total figure of 39,103*l*. 19*s*. 7*d*. On the other hand, the charterer says that the proper method of calculation is this: You take the actual outturn weight of the cargo which was weighed on arrival, and, as to the cargo which was not weighed on arrival, you allow the agreed estimated shrinkage of ·75 per cent., and you add those two figures together, but you have also to add something further in respect of the 579 tons, representing the balance of the available deadweight capacity of the ship. The charterer says that the proper way of making the calculation is to allow 83*s*. 6*d*. per ton on the 579 tons, which amounts to 2,417*l*. 6*s*. 6*d*., and he says that he is entitled to deduct from that sum 81*l*. 11*s*. 4*d*., representing a saving in the expenses of discharging the cargo, of which the shipowners had the benefit by reason of the fact that they did not have to discharge 579 tons of cargo.

On the figures in this case, I think that the issue between the parties can be disposed of without expressing a view as to the two rival methods of calculating the freight which is properly payable. It happens in this particular case that, putting on one side the saving in the expenses of discharging and the question of whether they were properly deductible, the amount payable on the charterer's calculation would have worked out at 39,144*l*. odd. But, they would have then said: "As cl. 6 "expressly provides that the steamer is not to earn more "freight than she would if loaded with a full cargo of wheat in "bags, and, as on the shipowners' own calculations on that "basis she would have only earned 39,103*l*. 19*s*. 7*d*., we must "reduce our figure of 39,144*l*. odd to 39,103*l*. 19*s*. 7*d*." Therefore, but for this question of the claim to deduct these expenses, the result in this case would have been identical, whichever party is right as to the proper method of calculation. It seems to me, therefore, that this part of the case turns entirely on the question whether or not the charterers would be entitled, even assuming that their method of calculation is correct, in deducting the sum saved in respect of discharging expenses.

Before going on to consider that matter further, I may state in passing that *this* clause has been the subject of discussion in two cases which have gone to the House of Lords. The first of those cases is *Red R. Steamship Co.* v. *Allatini Bros.* (1). In that case the whole of the cargo was optional cargo; the ship was not loaded down to her marks—she was only partially laden. It was decided in that case that the effect of *this* clause was to entitle the shipowners to recover a sum calculated in the same way as that in which the shipowners make their calculation in this case. That has been called, and has been referred to as, the "lump sum" method of calculation. The second of those cases is *Mazarakis* v. *Bunge y Born* (2). That was a case in which there was partly contemplated cargo and partly optional cargo, and the vessel was loaded to her marks. In that case it was held that the application of a clause similar to *this* cl. 6 did not on the facts result in freight calculated in the way it had resulted in the *Red R. Steamship Co.* v. *Allatini Bros.* (1): that is to say, you did not simply have to make a calculation based on the deadweight capacity of the ship, multiplied by the rate payable. Lord Sumner stated the matter quite shortly as follows: "I have come to the conclusion that, when the "option given by cl. 6 is exercised and the provisions of that "clause have to be reconciled with the other clauses which "govern the chartered voyage, the right construction of the "words, and the only feasible construction in business, is that "the freight payable is payable on delivered weights and on "right delivery and upon such a total weight as may earn "freight by right delivery, provided always that the weight "of a full and complete cargo of wheat in bags has been "shipped." Then he says: "The preferable construction "of cl. 6 is, that in the event of a due exercise of the option "given by that clause, freight, earned by right delivery and "calculated on the delivered weights of the several sorts of "cargo delivered, is to be paid at the rate agreed above for "heavy grain, but so that, either the steamer shall have been "loaded to her marks, or, if not, the total freight paid shall "not be less than the agreed rate for wheat in bags on a full "and complete cargo, duly delivered." Then he goes on to refer to the *Allatini* case (1), and says: "The expression "'lump sum charter,' so much relied on in argument, is, "I think, for present purposes, misleading. It may well be "that the freight payable under cl. 6 is such as to preclude "any claim for dead freight if the ship had not been loaded "to her marks at her final port of loading. Such a case arose

(1) (1910) 15 Com. Cas. 290. (2) (1926) 26 Ll. L. Rep. 169, 170.

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"in *Red R. Steamship Co.* v. *Allatini* (1), but it is not the case "here, and I therefore think that the expressions there used "about a 'lump sum' do not apply now. In no other respect "does this term fit the present charter. Nothing that was "said in *Allatini's* case (1) is a binding authority to determine "how the calculation of the charterparty freight is to be "made when a full cargo has been both shipped and delivered, "but has lost weight by evaporation during the voyage." In the *Mazarakis* case (2), both in the Court of Appeal and the House of Lords, the courts had envisaged a case like the present, namely, cargo partly optional and the vessel not loaded to her marks; and I think it clear that the view taken both in the Court of Appeal and the House of Lords was that neither the decision in the *Allatini* case (1) nor the speeches which they delivered in the *Mazarakis* case (3) were conclusive of the point which arises in the present case. Bankes L.J. in the *Mazarakis* case said: "Having regard to the facts of this "case, it is not material to consider what the position would "have been had the cargo shipped consisted partly of contemplated cargo and partly of optional cargo, and if the two "together had not completely filled the ship, so that the "deadweight capacity of the ship was represented by the cargo "shipped. In such a case as that, of course, the effect of "cl. 6 is to require the charterer to pay in respect of the "optional cargo a sum which will make up the full freight upon "the steamer's deadweight capacity; and in a sense, therefore, "the effect of the clause is in such a case as that to bring about "something which is not exactly, but very similar to, a payment "of lump sum freight, because there would be no question of "paying dead freight, but the sum which would have to be "paid would be a sum representing a rate of freight upon the "full deadweight capacity of the steamer. However, that "particular point does not arise in this case, because in fact a "full cargo was shipped." Warrington and Atkin L.JJ. referred to that possibility, but both refrained from expressing a view upon that matter. In the House of Lords, in the passage to which I have already referred, Lord Sumner envisaged it and dealt with it quite shortly, when he used the words: ". . . . "but so that, either the steamer shall have been loaded to her "marks, or, if not, the total freight paid shall not be less than "the agreed rate for wheat in bags on a full and complete

(1) 15 Com. Cas. 290.
(2) 26 Ll. L. Rep. 170.
(3) 24 Ll. L. Rep. 246; 26 Ll. L. Rep. 170.

"cargo, duly delivered." But I think that both the last part of that statement of Lord Sumner, and the statement that I have read from the judgment of Bankes L.J., were really obiter.

The learned umpire in this case took the view that the case which governed it was the *Red R. Steamship Co.* v. *Allatini* (1), and held that *Mazarakis* v. *Bunge y Born* (2) did not apply. He did not express a view with regard to the dicta of Bankes L.J and Lord Sumner in the *Mazarakis* case, but held that the *Allatini* case applied, and therefore the claimants were right in their method of calculation, merely multiplying the deadweight capacity of the ship, after allowing for normal shrinkage, by the agreed rate of 83*s.* 6*d.* per ton—and, in that view of the case, it did not become necessary for him to consider whether or not the claim by the charterers to deduct the saving in expenses of discharging was maintainable or not. But the learned judge in the court below came to a different conclusion. He held that the charterers were entitled to deduct those expenses, and he arrived at his conclusion in these words: "Before the arbitrator the respondent's claim seems "to have been based on a liability for dead-freight or damages. "If that were correct then I think the estimated discharging "expenses would be deductible from the freight attributable "to the shortage. But the two cases cited establish clearly "that the liability arising under cl. 6 is not for dead freight, "but is for freight due under the contract—not for breach of it. "The argument was not so put or restricted before me." Then he goes on to deal with the way in which the matter had been argued before him—that the deduction for the saving in the discharging expenses could be justified. Before that the learned judge had considered the *Allatini* case (1) and the *Mazarakis* case (2), and had said this: "The learned arbitrator "has accepted the claimants contention and held that their "calculation of freight is correct. The conclusion so reached "does not, as I see it, fully deal with or exhaust the respondent's "submissions before this court. Neither of the two cases "deals with the position which arises here, where part of the "cargo consists of specified and part of optional cargo and the "two together do not reach the deadweight capacity of the ship "for wheat in bags. But, as *Mazarakis* v. *Bunge y Born* (2) "is the later case, and as it deals with parcels of specified "and optional cargo, I am of opinion that it should be applied

(1) 15 Com. Cas. 290. (2) 26 Ll. L. Rep. 170.

"to the present case, and that the charterer is right in making "his calculation of freight on the several sorts of cargo delivered. "However, whichever view is taken, the argument on behalf "of the respondent still subsists, as I understand it, that in "assessing the freight, whether on a notional cargo of wheat in "bags to cover the shortage in deadweight or to cover freight "on the entire cargo, an allowance must be made to the "charterer for the discharging expenses saved by the ship-"owner. This argument was not advanced in either of the "cases to which I have referred." I think that the learned judge was there taking the view that the *Mazarakis* v. *Bunge y Born* (1) was the case that governed the present case, to the extent that the charterers were right in their contention that the calculation had to be made on the several sorts of cargo delivered, and allowing for something with regard to the notional cargo which had not been shipped, which was, I think, the method of calculation indicated by Lord Sumner. Then the learned judge went on to say that although this deduction in respect of the saving in discharge expenses could not be justified on a basis of dead freight, because on the authorities there had been no breach of contract on the part of the charterers, none the less, the same result could be arrived at by a different process—and this is how he arrives at it: "I think "that the charterparty should be looked at as a whole, "especially as cl. 6 has been described more than once as "ambiguous and puzzling. The charterparty is essentially "one for the carriage of grain, and where the option is given "to ship any other lawful merchandise, except a few specified "commodities, the freight on such merchandise is based on the "carriage of wheat in bags at the rate for heavy grain fixed "by the charterparty: that is, it keeps the ship, as far as "earnings are concerned, on the same basis as for one of the "specified grain cargoes. There is nothing to indicate that "the ship should gain by this. The indications are that she "should be in the same position, neither better nor worse, "whether grain is loaded or not. All extra expenses are for "the charterers. The steamer is not to earn more freight. "If wheat in bags only were shipped, and the cargo failed to "reach the deadweight, then dead freight or damages would be "recoverable from the charterers, and any saving to the ship "would be taken into consideration. If a full cargo were "shipped, then the ship would recover freight on the out-

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(1) 26 Ll. L. Rep. 170.

"turn weights and would have the expense of discharging the "full cargo in order to earn the freight. In my opinion, "the charterparty (and cl. 6 in particular) should be so interpreted that the shipowner is placed in no better position than "if he in fact carried wheat in bags instead of the optional "cargo,and that the respondent's contention is right."

I have arrived at a different conclusion with regard to the construction to be put upon cl. 6. I cannot find in that clause any justification for deducting these discharging expenses. The clause, in my view, is designed to provide a method of calculation in respect of freight payable when the option conferred by the clause is exercised. It provides in that case: ". . . . freight to be paid upon steamer's deadweight capacity "for wheat in bags on this voyage at the rate "above agreed for heavy grain, but steamer not to earn more "freight than she would if loaded with a full cargo of wheat "in bags. This option can only be used if the quantity of "other lawful merchandise as above shall amount to not less "than 200 tons. All extra expenses in loading and discharging "such merchandise over heavy grain to be paid by charterers." If that clause had not contained an express provision that the charterers were to pay extra expenses in loading and discharging as compared with heavy grain, the shipowners would have been liable under the other provisions of the charterparty for the extra expenses of loading and discharging, and, therefore, it was necessary to put in that provision in order that they might escape that liability. But that is a liability quite apart from the freight which is payable. The freight which is earned, in my opinion, has nothing to do with the payment of the expenses of loading and/or discharging. Furthermore, if it had been intended that, where optional cargo is shipped but the ship is not down to her marks, and, therefore, there is a saving in expense in the unloading of the cargo by the shipowners, in that event there should be a reduction in the freight payable, it would have been easy to say so. The argument is that there is a contrast between the words "freight to be "paid" and the words "steamer not to earn more freight," but I do not think that such a distinction as is contended for can properly be drawn. It seems to me that the argument of the charterers really amounts to contending that *this* language means: "But in such an event the shipowners are not to make "any greater profit out of the adventure than they would if "contemplated cargo had been shipped."

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Freight is the remuneration to which the shipowners are entitled on performance of their obligations under the charter party, and it is a sum which has no relation to the profits which they may make or the expenses which they may have to incur in order to earn that freight. It seems to me that this clause, on its proper construction, does not entitle the charterers to deduct from the freight which they have to pay the shipowners a sum which represents the saving of money which has enured to the benefit of the shipowners by reason of the exercise by the charterers of their option under this clause.

It was said by Sir William McNair that if the words " steamer " not to earn more freight than she would if loaded with a full " cargo of wheat in bags " have not the meaning for which he contends there can be no good reason for the inclusion of those words in the clause. I do not think that that argument should prevail. I think there are other reasons which would, or might, necessitate such language as this. For instance, differences might arise as a result of shrinkage of the cargo on the voyage. But, however that may be, I cannot interpret " freight earned " as meaning, or equivalent to " profit made on the voyage." For these reasons I think, even assuming that the charterers method of calculating freight is the correct one, they are not entitled to make this deduction, and, that being so, the result in the present instance is the same in figures as that contended for by the shipowners.

Taking that view of the matter, it becomes necessary to deal with the claim in respect of demurrage. On this point the learned judge said in his judgment : " The second issue between " the parties is in respect of demurrage. The claimants contend " ' that the lay days must be calculated upon the actual " ' quantities, namely, 8,858 tons and 8,796½ tons, loaded and " ' discharged, respectively.' The respondent contends ' that " ' at the loading port the calculation must be based upon the " ' deadweight capacity of the vessel for wheat in bags, namely, " ' 9,437 tons, and, at the discharging ports, upon the aggregate " ' out-turn weight at Liverpool, the bill of lading weights " ' (with no allowance for shrinkage) of the cargo discharged " ' at Avonmouth and the weight upon which . . . . . dead- " ' freight is payable, which in the aggregate amounts to 9,399½ " ' tons '." He then sets out the demurrage clauses and proceeds as follows : " The learned arbitrator has found as " follows . . . . ' cll. 13 and 25 (which provide for the lay

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" 'days at ports of loading and discharge respectively) are " 'wholly independent of the clauses which provide for the " 'calculation and payment of freight, and, upon their true " 'construction, provide that the lay days shall be calculated " 'upon the weights of cargo actually loaded and discharged " 'respectively.' Accordingly, I hold that the claimants' " 'calculations of demurrage are also correct'." Then the learned judge, having referred to the clauses in question, which I need not read, says: "On this issue I agree with the learned "arbitrator. The charterers have loaded cargo to the full "capacity of the ship, and if they had loaded and discharged "at the agreed rate the shipowners would have been free to "employ their vessel elsewhere during the time for which they "now claim demurrage. The clauses provide for demurrage on "a tonnage rate and draw no distinction between specified "and optional cargo, which may vary very considerably in "the rate of loading or discharging."

With regard to that, I find myself in agreement both with the learned umpire and the learned judge. It seems to me that it would require a lot to be read into cl. 13 if it was to have the meaning attributed to it by Sir William McNair—it would certainly have to read: "The steamer shall be loaded at the "rate of 500 tons per running day, calculated on the deadweight "capacity of the ship." I think that the learned umpire was quite right when he said that those clauses are wholly independent of the clauses with regard to freight. I do not understand him as meaning, when he uses those words, that it is not proper to take into consideration, in construing them, all the other relevant clauses of the charterparty. What he is saying is: "I cannot see anything in the other clauses of the "charterparty which has any bearing on this question of "demurrage." The view that he and the learned judge took, was that the lay days were to be dependent upon the loading and unloading of the actual cargo which was shipped and unloaded, and it seems to me that that is clearly the right view with regard to the claim in respect of demurrage, whatever may be the proper construction to be put upon cl. 6 of the charterparty.

For these reasons, I think that the appeal of the shipowners succeeds, and that the cross-appeal of the charterer fails.

SINGLETON L.J. I agree, and I propose to add just a few words on the first part of the case, as upon that part of the case

I take a different view to that taken by the learned judge in the court below. Under cl. 2 of the charterparty the obligation of the charterers, prima facie, was to provide, and of the ship to receive from the charterers, "a full and complete "cargo of wheat and/or maize and/or rye in bags and/or "bulk." Under cl. 6 the charterers had an option, which they exercised, of shipping "other lawful merchandise" (with certain exceptions), and, if they did exercise that option, freight was to be paid "upon steamer's deadweight capacity "for wheat in bags on this voyage at the rate above agreed on "for heavy grain, but the steamer not to earn more freight "than she would if loaded with a full cargo of wheat in bags." The exercise of that option resulted in this, that only 2,213 tons of maize was carried in the ship. The remainder of the cargo (linseed and pollards) took up the rest of the space in the ship, and the total cargo loaded filled the carrying space of the ship. The total weight carried was 579 tons short of the ship's total deadweight capacity for wheat in bags. Thereupon the charterers claimed to deduct from the freight payable the discharging expenses which the shipowners had saved by not having to load or to discharge the full amount of cargo. The amount in dispute between the parties in respect of this matter is comparatively small. It is a little surprising to me that in all the years that this charterparty has been used this specific question has, apparently, never before been the subject of litigation, although there has been a good deal of litigation on other clauses.

It seems to me that the first thing that has to be remembered in a matter of this kind is that one is not dealing with a claim for damages in any sense of the word. The rights of the parties depend on the contract made between them, and, for this purpose, the terms of that contract are to be found in cl. 6 of the charterparty. That clause, after specifying "freight to be "paid upon steamer's deadweight capacity for wheat in bags" and "steamer not to earn more freight than she would if loaded "with a full cargo of wheat in bags," says: "All extra "expenses in loading and discharging such merchandise over "heavy grain to be paid by charterers." When the shipowner was asked to give the charterers an option at the time of the formation of this charterparty, or when some amendment of it was made, the shipowner obviously said: "I will do that on "certain terms," one of which was the method of payment that I have already mentioned, and the other was: "All extra "expenses in loading and discharging are to be paid by the "charterer and I shall not be put to any expense on that "basis". The parties, ever since that term was introduced, have agreed on that basis. If the charterers were to have the benefit of any saving because of less expenses—(something in the nature of damages it might be)—it would have been quite easy to add to those words some such words as these: ". . . . "and any saving of expenses in loading or discharging to be "credited to, or for the benefit of, the charterers." That would have been quite an easy addition to make if the parties had agreed on it. But no such words appear here. The argument of Sir William McNair, on behalf of the charterers, is that the words "but steamer not to earn more freight than "she would if loaded with a full cargo of wheat in bags" means "net freight," or something of that kind. If I may say so, I agree with what Sir Robert Aske said in regard to that matter. I do not know, for this purpose, what is the meaning of "net freight." "Freight" means "freight": it does not mean "freight less expenses of earning that freight." "Freight earned" means "freight due under the contract" —and the word "freight" is used in that sense in cl. 6 of the charterparty. In the absence of any such words as I have indicated I do not see that the charterers can succeed, and I agree with that which my Lord has said, namely, that the judgment of Sellers J. in this respect errs. I agree that this appeal must be allowed. I do not desire to say anything in regard to the cross-appeal. I am in complete agreement with the judgment of Sellers J. as to that.

DENNING L.J. I agree. When the option given by cl. 6 of the charterparty is exercised the charterers are absolved from the responsibility of loading a full and complete cargo of the contemplated kind. They are given the option of loading "other lawful merchandise," which may be as much as the ship can carry, or as little as 200 tons. When that option is exercised the ship need not load a full and complete cargo. The freight at so much per ton of cargo "delivered" is, therefore, inapplicable. So the parties have substituted a sum fixed by the deadweight capacity of the ship. If the charterers do not choose to utilize the whole of that capacity, that is their affair. So much I take to be clear. But the option clause contains a stipulated maximum, whereby the steamer is not to earn more freight than she would have done if loaded with a

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full cargo of wheat in bags. The shipowners here say that that maximum operates to reduce the freight calculated on deadweight capacity, because such a cargo would shrink in the course of transit, and also to reduce the freight in cases where the ship is brought down to her marks by loading a cargo heavier than wheat and would not be down to her marks when loaded with a cargo of wheat in bags. But the charterers say that a further meaning is to be given to it so as to reduce the freight in cases when the optional cargo costs less to load or unload than wheat in bags.

In my opinion, the short answer to this argument, as a matter of construction, is this: the clause requires this question to be asked: What freight would the ship earn if loaded with a full cargo of wheat in bags? That question is answered by taking the gross weight delivered in tons and multiplying by the stipulated rate of freight per ton. In order to ascertain the freight earned, you do not deduct the expenses incurred in earning that freight. Sir William McNair contends that the shipowner should be no better off by reason of the loading of optional cargo, but I see no room for inserting words to that effect in the clause. The clause obliging the charterer to pay any extra expense of loading and discharging optional cargo requires that the shipowner shall be no worse off, but does not say that he shall not be better off.

Sir William McNair has disclaimed any intention to treat any part of the freight payable under cl. 6 as dead freight, i.e., as damages, but I think that that is just what he is doing. He is really saying that the shipowner is only to be allowed the damages which he has suffered by reason of the contemplated cargo not being shipped. If this had been a claim for damages, it would mean that the shipowner would have to give credit for the expenses saved by not having to load and unload the non-existing cargo, and for the time saved in loading and unloading. But the claim is not a claim for damages and the contract does not provide for any credit of that kind. It provides for a simple calculation of freight. It seems to me that Sir William McNair's contention would involve a complicated assessment of the amount the shipowner would save by reason of the optional cargo being shipped. It would open the door to many disputes and arbitrations. It is quite reasonable to suppose that the business men who framed this charter intended to avoid complications of that sort.

I agree that the demurrage clauses are quite clear, and that

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they refer only to the cargo shipped. I therefore agree with the order proposed by my Lord.

Appeal allowed.
Cross-appeal dismissed.
Leave to appeal to House of Lords.

Solicitors for shipowners: *Holman, Fenwick & Willan.*
Solicitor for charterer: *The Treasury Solicitor.*

A. W. G.

Applied. WHITTY *v.* SCOTT-RUSSELL. [1950] 1 All E.R. 884.

Followed. WHITTY *v.* SCOTT-RUSSELL [1950] 2 K. B. 32

LANGFORD PROPERTY CO. LIMITED *v.* GOLDRICH.

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Jan. 20, 21, 24.

Lord Greene M.R., Somervell and Singleton L.JJ.

Landlord and tenant—Rent restrictions—Whether two self-contained flats let together constitute a "separate dwelling-house"—"Rateable value on appropriate day"—Aggregate rateable values of flats exceed 100*l.—Whether flats controlled by Rent Acts—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 16, *sub-s.* 1*—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 26), *s.* 7*—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1, *s.* 7, *sub-ss.* 1, 3.

On April 1, 1939 (being the appropriate day for the purposes s. 3, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act, 1939), two self-contained but not adjoining flats Nos. 13 and 15 in a block of flats in Golders Green, Middlesex were separately let and appeared in the valuation list as being of the rateable value of 98*l.* and 92*l.* respectively. On March 24, 1940, the valuation list was amended and the rateable value of flat No. 13 was reduced to 54*l.* and that of flat No. 15 to 52*l.* the new rateable values being made retrospective as from April 1, 1939. On July 1, 1941, the two flats were let together for the first time under one tenancy with a garage and were occupied together by the tenant as a home for himself and his family. No structual alterations were made to the flats. On June 19, 1942, the valuation list was again amended, the rateable values of the flats being reduced to 48*l.* and 46*l.* respectively, and the new rateable values being made retrospective as from April 1, 1941. The rateable value of the garage was at all material times 6*l.* The landlord by notice to quit determined the tenancy, the tenant however refused to give up possession claiming that he was entitled to the protection of the Rent Restriction Acts.

Birkett J. made an order for possession and the tenant appealed.

Held, dismissing the appeal, (1.) that the two flats together were within the definition of a "dwelling-house" in s. 16, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 and constituted one dwelling-house for the purposes of the Acts, and (2.) that the contention of the tenant—that the rateable value of the new hereditament (consisting of the two flats and the garage) had never been assessed and that having regard to s. 7, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, the dwelling-house must accordingly be deemed to be a dwelling-house to which the Acts applied as the contrary was not shown—was wrong. Although the dwelling-house constituted by the two flats was first let as a separate dwelling on July 1, 1941, there was nevertheless a value shown in the valuation list in force on the appropriate day in respect of the dwelling-house so constituted, that value being the sum of the rateable values of the two flats. As the aggregate rateable value so shown exceeded 100*l.* the tenant was not entitled to the protection of the Acts.

APPEAL from Birkett J. (1).

The plaintiffs, Langford Property Co. Ld., claimed possession of two flats respectively numbered 13 and 15 and situate on the same floor of a block of flats in Golders Green, Middlesex, within the Metropolitan police district of London. The flats were not adjoining one another. The flats together with a garage were first of all let to the defendant James Goldrich by an agreement, dated July 1, 1941, at a rent of 300*l.* per annum for a term commencing September 1, 1941. By subsequent agreements the tenancy was renewed from time to time at a progressively higher rent, the latest rent being 525*l.* per annum. Before July 1, 1941, the flats had never been let together to one tenant, but each of them had been let to a different tenant other than the defendant. The tenant occupied the two flats as one as a home for himself and his family.

On May 27, 1947, the tenancy was determined by the landlord by a notice in prescribed terms, but the tenant refused to give up possession and claimed the protection of the Rent Restriction Acts. He counterclaimed for repayment of money which he had paid as rent in excess of what he alleged to be the standard rent of 300*l.* per annum.

In order to decide whether or not the flats were protected by the Rent Acts it was necessary to ascertain whether for the purpose of those Acts the two flats together constituted a separate dwelling-house within the meaning of s. 16, sub-s. 1,

(1) [1948] 2 K. B. 423.

of the Act of 1933 (1), and secondly, if so, whether its "rateable "value on the appropriate day" did not or did exceed 100*l.* a year (the maximum figure fixed for the Metropolitan Police District for this purpose) within the meaning of s. 3, sub-s. 1, and s. 7, sub-s. 1, on the one hand, or sub-s. 3 on the other hand, of the Act of 1939 (2).

As the two flats were situate in Golders Green, Middlesex, the appropriate day within the meaning of s. 7, sub-s. 1, of the

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(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 s. 16, sub-s. 1: "In this Act, "unless the context otherwise "requires, the following expressions have the meanings hereby "respectively assigned to them, "that is to say: . . . . 'Dwelling-"'house' has the same meaning "as in the principal Acts, that is "to say, a house let as a separate "dwelling or a part of a house "being a part so let . . . ."

(2) Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 1: "Without prejudice to the "operation of the two preceding "sections in relation to any dwelling-house to which the principal "Acts applied immediately before "the commencement of this Act, "the principal Acts, as amended "by the last preceding section, "shall, subject to the provisions "of this section, apply to every "other dwelling-house of which "the rateable value on the appropriate day did not exceed:— "(*a*) in the Metropolitan Police "District or the City of London "100*l.* . . . ."

Section 7, sub-s. 1: "In this "Act the following expressions "have the meanings hereby respectively assigned to them, that "is to say:— . . . . 'rateable "'value on the appropriate day', "in relation to any dwelling-house, "means (subject to the following "provisions of this section) the "value shown, with respect to "that dwelling-house, on that day "in the valuation list then in "force, as the rateable value or, "where the net annual value "differs from the rateable value, "as the net annual value; and 'the "'appropriate day' means, as "respects the administrative "county of London, April 6, 1939 "or, as respects the remainder of "England, April 1, 1939 . . . ."

Sub-section 2: "In relation to "any dwelling-house of which the "rateable value on the appropriate day was not on that day "separately assessed, any reference in the preceding provisions "of this Act to the rateable value "on the appropriate day shall be "construed as a reference to such "proportion of the rateable value "on that day of the property in "which the dwelling-house is comprised as may be apportioned to "the dwelling-house by the county "court in accordance with the "provisions of sub-s. 3 of s. 12 "of the Increase of Rent and "Mortgage Interest (Restrictions) "Act, 1920."

Sub-section 3: "In relation "to any dwelling-house first "assessed after the appropriate "day, any reference in the preceding provisions of this Act to "the rateable value on the appropriate day shall be construed as "a reference to the rateable value "on the day on which the dwelling house was first assessed."

Act of 1939 was April 1, 1939. On that date the rateable value of flat No. 13 was 98*l.* and the rateable value of flat No. 15 was 92*l.* On March 24, 1940, the valuation list was amended by reducing the rateable value of the flat No. 13 from 98*l.* to 54*l.*, and of flat No. 15 from 92*l.* to 52*l.*, in each case retrospectively as from April 1, 1939. On June 19, 1942, the valuation list was further amended by reducing the rateable value of flat No. 13 from 54*l.* to 48*l.* and of flat No. 15 from 52*l.* to 46*l.*, in each case retrospectively as from April 1, 1941.

In the court below the tenant had contended that there had been two separate lettings to him of two separate flats each within the protection of the Rent Restriction Acts. This contention was not advanced in the Court of Appeal.

Birkett J. gave judgment for the landlord holding that a new entity had come into existence on July 1, 1941, constituted of the combined flats and garage, but that that entity did not constitute a separate dwelling-house within the meaning of s. 16, sub-s. 1, of the Act of 1933. If, however, that entity did constitute a separate dwelling-house, as the aggregate rateable value of the two flats exceeded 100*l.*, that dwelling-house was outside the scope of the Acts and it was accordingly not controlled. The tenant appealed.

Scott Henderson K.C. and *I. H. Jacob* for the tenant. The tenant does not now contend that this was a letting of two separate flats each within the Rent Restriction Acts. Our first submission is that this was a letting of a single dwelling-house within the definition of "dwelling-house" in s. 16, sub-s. 1, of the Act of 1933. The fact that the two flats are separated and the tenant has to pass along a passage used by tenants of other flats in the block to get from one flat to the other does not prevent them together constituting a single dwelling-house. In fact they were used as a single dwelling-house by the tenant for himself and his family. *Sheehan* v. *Cutler* (1) and *Selwyn* v. *Hamill* (2) are distinguishable. In those cases the question was whether suitable alternative accommodation was provided for a tenant, where such accommodation was in two different houses.

Our second submission is that this dwelling-house only came into existence on July 1, 1941, when the two flats were first let together as one unit. If one looks at the valuation list in force at the appropriate day this new dwelling-house has no

(1) [1946] K. B. 339.
(2) [1948] 1 All E. R. 70.

rateable value. There has never been a separate assessment of the two flats together with the garage as a single unit. There have only been three separate assessments in respect of the three units which together constitute this dwelling-house. Accordingly, the rateable value of this new dwelling-house has never been assessed, and there is no rateable value for the purposes of s. 7, sub-s. 3, of the Act of 1939. It is not possible to aggregate the separate assessments of the three units for the purpose of discovering the rateable value of the new dwelling-house, *Vaughan* v. *Shaw* (1). The learned judge was wrong in aggregating the assessments to discover the rateable value. The second step in my argument is that as no assessment is shown in the valuation list in respect of this dwelling-house, the landlord cannot discharge the onus put on him by s. 7, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (2), and show that the dwelling-house is outside the scope of the Acts as he cannot show what the rateable value is. There is, in fact, no hardship on the landlord if the new dwelling-house is within the scope of the Acts, as each flat separately is within the Acts.

Beney K.C. and *Heathcote-Williams* for the landlord. The landlord contends that a letting of two self-contained flats cannot constitute a letting of a dwelling-house within the definition of "dwelling-house" in s. 16, sub-s. 1, of the Act of 1933. Two flats cannot be a "separate dwelling-house." That they are not one dwelling-house is clear if the physical nature of the premises is considered. This is a question of fact. If that submission is wrong and this is a dwelling-house, it is submitted it is not a dwelling-house to which the Acts apply. In this case it is necessary to look at s. 7, sub-s. 3, of the Act of 1939, and the question arises as to what was "the rateable value" of this new dwelling-house. The flats have not been altered at all since the letting to the tenant. There is accordingly no ground for reassessing them. The rateable value of both flats is to be found on the valuation list. *Attorney-General* v. *Mutual Tontine Westminster Chambers Association, Ld.* (3) is an authority for stating that the two

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(1) [1945] K. B. 400.

(2) Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 7, sub-s. 1: "If any "question arises in any proceedings whether the principal Acts "apply to a dwelling-house, it "shall be deemed to be a dwelling-"house to which those Acts apply "unless the contrary is shown."

(3) (1876) 1 Ex. D. 469.

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assessments should be added together: see also *Reg.* v. *St. George's Union* (1). It is a novel theory that the rating valuation should vary with the manner in which a tenant uses the premises. The rating authority cannot be forced to reassess this hereditament and, should it refuse to do so, it would be impossible to apply the yardstick laid down in the Acts. [He referred to the Rating and Valuation Act, 1925, s. 37.] The decision in *Vaughan* v. *Shaw* (2) is distinguishable as that case dealt with the aggregation of standard rents.

Scott Henderson K.C. in reply. The question is as to the meaning of "rateable value" in s. 7, sub-s. 3, of the Act of 1939. The problem is to identify the dwelling-house let in 1941. It is not the same as the two dwelling-houses which were let in 1939. In the valuation list the dwelling-house let in 1941 consisting of the two flats and the garage does not appear. It is accordingly impossible to find the rateable value of these premises for the purposes of the Acts.

SOMERVELL L.J. In this case the plaintiff landlord sought possession of certain premises, Nos. 13 and 14, West Heath Court and garage No. 24, from the tenant. Those premises had been let to the tenant under successive tenancy agreements, the first of which was dated July 1, 1941, and the last of which had been duly determined at the time when the proceedings were brought. The tenant claimed the protection of the Rent Restriction Acts, and the landlord disputed his right to do so. If any Rent Restriction Act applies so as to protect the tenant, it is common ground that it is the Act of 1939.

The facts are very fully set out in the judgment of the learned judge below, but I will refer to such of them as are relevant to my decision. The premises consisted of two flats which had previously been separately let; they were on the same floor of a block of flats, though I think not actually next to each other. As I have said, the flats were first let by a memorandum of agreement dated July 1, 1941: "The landlord agrees to let "and the tenant agrees to take all those dwelling-rooms and "premises being on the fourth floor and number 13/15 of the "messuage and tenement known as West Heath Court North "End Road Golders Green in the County of London together "with Garage No. 24." The garage, of which I shall have something to say later, was one of a number of garages in, as I understand it, a single block. It is not disputed that the tenant took these two flats as a home for himself and some relatives, I think his father, mother and a married sister. The judge decided that the tenant was not entitled to the protection of the Acts.

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(1) (1871) L. R. 7 Q. B. 90.

(2) [1945] K. B. 400.

A number of points were argued, some of which, on the conclusion to which I have come, do not arise, but it will, I think, be convenient to take the first point which was taken by Mr. Beney for the landlord, namely, that this was not a letting of a dwelling-house within the definition of "dwelling-house" in s. 16 of the Act of 1933, that section being incorporated in the Act of 1939 by appropriate words which occur in s. 7 of that Act. The definition of "dwelling-house" in s. 16 of the Act of 1933 is as follows: "'Dwelling-house' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let." Mr. Beney submitted that two self-contained flats capable of and in fact previously let as separate flats cannot be let as a separate dwelling. I think the learned judge accepted this contention, although he also decided the case on another ground; but, if he did accept this first contention, with respect, I do not agree. If one looks at the definition, it is plain that the words "'dwelling-house' . . . . that is to say, a house," include and cover a flat. Under the Interpretation Act, 1889, the singular includes the plural unless the context otherwise requires. In my opinion, if the facts justify such a finding, two flats or, indeed, so far as I can see, two houses, could be let as a separate dwelling-house within the meaning of the definition. What happened here was that the tenant wished to accommodate in his home these relatives to whom I have referred, and he wanted more accommodation than could be found or conveniently found in one flat. He therefore took the two flats and made those two flats his home. Mr. Beney suggested at one time that there might be some absurdity, if, say, a man took under a single lease (which does not seem very probable) two flats in widely separated districts; but that case can be dealt with when it arises.

I turn to the judgment of the learned judge, because on this point he relied on two cases which dealt with a different subject-matter. The two cases to which the learned judge referred dealt with the question whether the accommodation which a plaintiff landlord seeking possession was offering was suitable alternative accommodation, and the provisions of s. 3, sub-ss. 1 and 3 of the Act of 1933 had to be construed and applied. Those are the familiar provisions which say that in certain circumstances no order for possession can be made unless the court is satisfied that suitable alternative accommodation is available to the tenant, or will be available, when the order or judgment takes effect. Sub-section 3 of that section sets out certain conditions which have to be fulfilled, or certain principles which have to be applied, if the accommodation is to be considered suitable alternative accommodation. In both those cases what in effect was being offered was accommodation in a house supplemented by a room in another and separate house. Birkett J., after citing passages from the first case, *Sheehan* v. *Cutler* (1), sums up the ratio decidendi of the decision in that case. He says (2): "Then the learned Lord Justice goes on to deal further with "those matters and comes to the conclusion, with which the "other members of the court agree, that the question of "suitable alternative accommodation is not satisfied by the "offer of a house with the additional offer of a single room in "another house but contemplates similar accommodation to "the accommodation which he originally had." The other case, in which the first case was followed and applied, was *Selwyn* v. *Hamill* (3). As it seems to me, when a landlord is seeking possession from a tenant who has been accommodated with his family in a single house, the question whether alternative accommodation which requires one member of the family to use a room in a separate house is reasonably suitable is a different question from that which we have to decide on this part of the argument. Therefore I do not myself think that what is said in those cases and on the construction of those sections with regard to the context excluding the application of the Interpretation Act, that the singular includes the plural, is decisive in any way of the decision to which I have to come in this case, and for which I have given my reasons. I think that these premises do come within the definition of "dwelling-"house" in s. 16; and that that point therefore fails.

The second point is quite a different one and arises on certain sections of the Act of 1939. The landlord says that the tenant is not entitled to the protection of that Act because the rateable value of the dwelling-house exceeds the limits within which that Act is applicable. That provision is laid down in s. 3 of the Act of 1939, and says: "Without prejudice to the oper-

(1) [1946] K. B. 339.
(2) [1948] 2 K. B. 423, 424.
(3) [1948] 1 All E. R. 70.

"ation of the two preceding sections in relation to any dwelling-"house to which the principal Acts applied immediately before "the commencement of this Act"—that does not affect us here—"the principal Acts, as amended by the last preceding "section, shall, subject to the provisions of this section, apply "to every other dwelling-house of which the rateable value on "the appropriate day did not exceed (*a*) in the Metropolitan "Police District or the City of London, 100*l*." That is the provision with which we are concerned: did the rateable value on the appropriate day exceed 100*l*.? In order to find out what was the appropriate day, and how the rateable value is defined, one has to look at s. 7 of the Act of 1939: "'Rateable value on the appropriate day,' in relation to any "dwelling-house, means (subject to the following provisions of "this section) the value shown, with respect to that dwelling-"house, on that day in the valuation list then in force, as the "rateable value or, where the net annual value differs from the "rateable value, as the net annual value." Then "'The "'appropriate day' means, as respects the administrative "county of London, April 6, 1939, or, as respects the remainder "of England, April 1, 1939; and other expressions have the "same meanings as in the Rent and Mortgage Interest "Restrictions (Amendment) Act, 1933." Then Mr. Scott Henderson relied on sub-s. 2 of this section, which I will read, because I think I can dispose of it shortly. That says: "In relation to any dwelling-house of which the rateable value "on the appropriate day was not on that day separately "assessed, any reference in the preceding provisions of this "Act to the rateable value on the appropriate day shall be "construed as a reference to such proportion of the rateable "value on that day of the property in which the dwelling-house "is comprised as may be apportioned to the dwelling-"house by the county court in accordance with the provisions "of sub-s. 3 of s. 12 of the Increase of Rent and Mortgage "Interest (Restrictions) Act, 1920." That sub-section, in my opinion, does not assist in this appeal, because it is dealing with a case, which I shall show is not this case, namely, where the dwelling-house is part of a larger rateable or rated unit. Sub-section 3 says this: "In relation to any dwelling-house "first assessed after the appropriate day, any reference in the "preceding provisions of this Act to the rateable value on the "appropriate day shall be construed as a reference to the "rateable value on the day on which the dwelling-house was "first assessed."

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Having read those provisions of the statute, I will state shortly the relevant facts with regard to the rating in respect of these two flats and the garage. The two flats on the appropriate day within the definition which I have read being separately let at that time appear in the valuation list, one at 98*l.* and the other at 92*l.* There was a retrospective reduction at a later date, but the effect of that still left the sum of the two assessments in excess of 100*l.* We are dealing, as I said in the earlier part of this judgment, with a dwelling-house consisting of two flats and a garage. I will leave aside the garage for the moment because a separate argument was based on that. The first question, as it seems to me, is this, going back to s. 7, which I have read: Was a value shown with respect to this dwelling-house on the appropriate day in April of 1939 in the valuation list then in force? As was pointed out in the course of the argument by the Master of the Rolls, the Rent Restriction Acts are dealing with premises which constitute in ordinary language the home of the tenant, whereas rating Acts are dealing with hereditaments. The two often, of course, coincide. A man's home is a separately rateable and rated hereditament, and no particular problem arises, but, of course, there are many cases, and the Act makes special provision for them, in which the premises taken by the tenant as his home, as a dwelling-house within the meaning of the Act, is only part of the hereditament which the rating authorities have rated, and, in those circumstances, there is provision for an apportionment. But if I am right in the earlier part of this judgment, the dwelling-house which has to be considered may consist of two rateable hereditaments, as happened here, there having been a separate assessment of No. 13 and No. 15. Mr. Scott Henderson submitted that when this tenant entered into his first tenancy agreement in respect of Nos. 13 and 15 irrespective of the garage, on which he had a separate argument, a new rateable hereditament came into existence. That new rateable hereditament consisting of Nos. 13 and 15, he said, has never been assessed, and he relied on s. 7, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, which says this: "If any question arises in any proceedings whether "the principal Acts apply to a dwelling-house, it shall be "deemed to be a dwelling-house to which those Acts apply "unless the contrary is shown." He said that the contrary cannot be shown, because this dwelling-house has never been assessed; there never has been a first assessment within s. 7, sub-s. 3, of the Act of 1939, and, therefore, the landlord fails to discharge the onus of proof, which the section which I have read places upon him, of showing that the house is outside the Act. I am unable to accept this contention. As it seems to me, if a man takes two flats, as here, or, if you like, two adjoining houses, that fact has no relevance to the rating valuation. If the tenant, having taken the two houses under one document, then proceeds to sub-let one of them, Mr. Scott Henderson, I think, did not suggest that there was any, or could be any, effect on the rating valuation. So far as I followed his argument, if the tenant, having taken those two houses, puts, say, his parents in one of them without charging a rent, but the parents have their own establishment there, eat there and sleep there and have their living rooms there, then again, he would not say that a new rateable unit had come into existence; but he submits that the position is different if, as here, the two separately rated premises (as to which I should perhaps have stated there was no structural alteration of any kind made when they were taken by this tenant) are used as what I may call a combined establishment, all the cooking normally done in one and the meals taken in one, and that that makes a difference and justifies his submission that a new rateable hereditament had come into existence to which the entries in the valuation list as at April, 1939, have in effect no application. I could not appreciate any real reason for that submission which Mr. Scott Henderson advanced. The view which I have formed is that it is incorrect to say that, if a man takes, as here, two flats, the rating position and the rateable value is affected by that fact, even though he uses them in the way described here, namely, all the meals being taken in one, and the other just used perhaps for sleeping and a living room. It seems to me, therefore, that, although this dwelling-house was first let as a dwelling-house, namely, the two flats combined, in 1941, that does not alter the fact that in the valuation list in force in April, 1939, the value was shown with respect to that dwelling-house in the valuation list then in force, that value, so far as the two flats are concerned, being the sum of the rateable values of flat No. 13 and flat No. 15.

Mr. Beney, in submitting that the conclusion to which I have come was right, referred us to two cases. It is only necessary, I think, to refer to one of them, namely, the *Attorney-General* v. *The Mutual Tontine Westminster Chambers Association, Ld.* (1). That dealt with some rather complicated provisions,

(1) 1 Ex D. 469.

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but was a case where there were blocks of flats, each block containing suites, like chambers in the Inns of Court, and those suites had, for certain statutory purposes, all been separately rated. The question was whether for other statutory purposes where it was held that you had to rate the defendants in that case as occupiers of the whole of the blocks, you could arrive at that value by aggregating the rateable values that had been placed on the separate suites. There was another question with which we are not concerned. Sir George Jessel M.R., in dealing with this point, after referring to certain words in the statute, said this (1): "Now it is said that, under those "words, inasmuch as you have to value the house, and the "house as such has not been separately valued in any valuation "list, though each tenement composing the house has been "so valued, it is necessary to make a separate valuation of one "hereditament, namely, the house. One answer to that "might be that the words 'separately valued' means when "you cannot ascertain its separate value; and that in the "present case you can ascertain its separate value from the "valuation list by adding up the value of all the tenements; "in fact, that it is for this purpose separately valued, because "you can ascertain without going beyond the list the total "separate valuation of the hereditaments. It may be in two "parts or in ten parts, but the total of the two or the ten parts "does give you the separate valuation." The statutory provisions there were different, and I am dealing with the facts of this case, but it seems to me that the principle which has led me to the conclusion at which I have arrived in this case, construing these statutes, is in accordance with the principle which was dealt with and applied in that case. It may be that on other facts the rateable value of premises may be affected as a result of the occupation following on their being comprised for the first time under one lease.

So much for the argument in so far as it was based on that fact alone, that the two flats were let together. I should perhaps refer to a case which was relied upon by Mr. Scott Henderson, namely, *Vaughan* v. *Shaw* (2). That case dealt with a dwelling-house which "was let on September 1, 1939, "to two tenants occupying distinct, but not structurally "separated, tenements at rents of 17*s*. and 15*s*. 6*d*. a week "respectively. In January, 1941, the house was let as a whole "to a tenant at 25*s*. a week." The question was, what was the standard rent of the house let as a whole, and it was held: "That the standard rent of the house was 25*s*. a week, being the "rent at which it was first let as a whole, and not 32*s*. 6*d*. "the aggregate of the rents of the two parts." I do not propose to go through that case in detail. Of course, the provisions as to standard rents are not the provisions with which we are concerned, but there seems to me to be no inconsistency in holding that, although these two flats were first let as a dwelling-house in 1941, that does not decide the question whether, in deciding its rateable value, you may not find entries in the valuation list in force in April, 1939, which enable one to ascertain its "rateable value" as defined in the Act of 1939.

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(1) 1 Ex. D. 469, 481.

(2) [1945] K. B. 400.

Mr. Scott Henderson raised a separate point with regard to the garage. The garage was one, as I think I have stated, of a number of garages which were assessed as a block, and a figure of, I think, some 6*l*. was arrived at for the purposes of pleading, or in the course of the argument below, which was said to be the proportion of the total assessment on the block which should be allocated to this garage. Mr. Scott Henderson submitted that there is no assessment on what was let here, namely, the two flats and the garage. There had been no legal apportionment by a court of the total rateable value of the block of garages. There was merely an estimate put forward and, therefore, he said, the dwelling-house, which included the garage, has never been assessed, and you cannot find the rateable value of the dwelling-house, which includes the garage, by looking at the valuation list. With respect, I do not think that that argument succeeds, for this reason, that what one has to consider here, or what the Act is concerned with, is the question whether the rateable value on the appropriate day did not exceed 100*l*. If you find, when looking at the valuation list, that, as here, the rateable value of the dwelling-house, apart from the garage, exceeds 100*l*., that seems to me sufficient proof by the landlord that what he has let is outside the Act. You may, of course, get borderline cases, and if the rateable value of the premises, apart from the garage, was, say, 99*l*., and the landlord sought to show that when you added on the rateable value of a garage which had never been separately assessed it brought it over 100*l*., he might have to take steps which have not been taken here, the nature of which it is not necessary to consider, because that is not this case. In this case the landlord can show that the value of the part of what was let, which in fact comprised

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the whole of the premises in which the tenant was to dwell, exceeded 100*l.*, and that, therefore, as it seems to me, is sufficient for him. As was pointed out by the Master of the Rolls when this point was under discussion, one might have a case where a man agreed to take a house on condition that the landlord put up a garage, and the landlord did so; the house was taken; and the rateable value of the house before the garage was put up was, say, 150*l.* If Mr. Scott Henderson's argument was right, the tenant could say: "This dwelling-house, which "includes the garage which you built, has never been assessed, "and, therefore, you have failed to show that it was outside "the Act." That would be a remarkable conclusion, and I do not find any words in the Act which lead one to it. On that point the learned judge decided in favour of the landlord, for the reasons which I have tried to express, and I agree with his conclusion on that point.

Another issue was argued below. It was sought to be said that, even if the Acts did not in law apply, the landlord was estopped from so maintaining. I think there is no doubt at all that at a certain stage in the negotiations, or possibly throughout most of them, the landlord thought that these premises were within the Acts, and there were various discussions about what was the standard rent, and so on. So far as the point of estoppel was concerned, Mr. Scott Henderson, I think, admitted—anyhow I clearly hold—that what was pleaded in the statement of claim could not constitute an estoppel; indeed, we all so held in the course of the argument. He also conceded that there was no evidence that the tenant had acted on any representation of fact which might have been alleged as an estoppel, if it had been pleaded in the defence. For those reasons we ruled against Mr. Scott Henderson on this point. When those points emerged we decided that the plea of estoppel could not be raised in this court, and we did not thererore ask Mr. Beney to deal with it.

There was one other point to which I do not think it is necessary to refer because of the conclusions to which I have come. The point was whether, if there is a diminution of rateable value which is made retrospective for the purposes of rating, when applying s. 7 to the value to see what was in the valuation list in force on whatever turns out to be the appropriate day, one looks at the figure which was actually there on that day, or whether one has to take the figure to which the assessment was retrospectively reduced. That point, on the view which I take, does not arise, and, therefore, I do not say any more about it.

For these reasons, I think that this appeal fails and must be dismissed.

SINGLETON L.J. I agree.

LORD GREENE M.R. I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Franks, Charlesley & Leighton; Stikeman & Co.*

B. A. B.

THE ROYAL GREEK GOVERNMENT *v.* THE MINISTER OF TRANSPORT

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Bucknill, Cohen and Singleton L.JJ.

Shipping—Charter-party—Time charter—Obligation to pay hire—Suspension of, in case of " deficiency of men or owners' stores . . . . " or other accident "—Full complement of officers and men on board vessel—Refusal, in time of war, to sail, unless in convoy—Unwillingness to work.

By a time charter, shipowners undertook to provide a full complement of officers and crew for a vessel and by cl. 11A:—" In the event of dry docking or other necessary measures to " maintain the efficiency of the vessel, deficiency of men or " owners' stores, breakdown of machinery, damage to hull or " other accident, either hindering or preventing the working of the " vessel and continuing for more than 24 consecutive hours, " no hire to be paid in respect of any time lost thereby during " the period in which the vessel is unable to perform the service " immediately required." By a subsequent clause, the side-note to which was: " Deficiency of Crew," what was described as an addendum to cl. 11A, was inserted, prefaced by the words:—" Notwithstanding the provisions of cl. 11A, it is agreed that in " the event of loss of time due solely to inability to get or to " complete a crew." Then followed provision for part payment of hire in certain cases. During the currency of the charter a full complement of officers and crew of the vessel on board at a port refused, for a week, to sail, except in convoy, and, in consequence,

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for that time the vessel was unable to perform the service immediately required.

It was contended for the charterer that the words in cl. 11A "deficiency of men" imported a qualitative as well as a quantitative element and that as, if owners' stores became bad and unfit for human consumption there would be a deficiency of stores, so when a full complement of officers and men on board refused to work, there was a "deficiency of men" within the meaning of cl. 11A.

Held, that the words "deficiency of men" in cl. 11A, of this charter-party meant numerical insufficiency, the contrasting word being "sufficiency." If it had been desired to introduce the qualitative element, the natural contrast would be between "efficiency and inefficiency." The words "deficiency of men" were in an exceptions' clause and the charterer must show clearly that he brought his case within the terms of the exception. Neither did what had occurred resemble any of the other events enumerated in cl. 11A, which would serve to put the vessel off hire; nor was what had occurred an "other accident" within the meaning of that clause.

Decision of Sellers J. ante, p. 7, affirmed.

APPEAL from a decision of Sellers J. (1) on an award in the form of a special case stated by Mr. Patrick Devlin K.C. as arbitrator.

By a time charter, dated August 29, 1941, the Minister of Transport agreed to charter the S.s. *Ilissos* from the Royal Greek Government as disponent shipowners, for a hire of 16*s*. 6*d*. per ton per month. By cl. 11A: "In the event of "dry docking or other necessary measures to maintain the "efficiency of the vessel, deficiency of men or owners' stores, "breakdown of machinery, damage to hull or other accident, "either hindering or preventing the working of the vessel and "continuing for more than twenty-four consecutive hours, no "hire to be paid in respect of any time lost thereby during the "period in which the vessel is unable to perform the service "immediately required."

By cl. 34—the sidenote to which was "Deficiency of Crew"—an addendum to cl. 11A was inserted: "Notwithstanding "the provisions of cl. 11A, it is agreed that in the event of loss "of time due solely to inability to get or to complete a crew—"(*a*) full hire will be paid for the first seventy-two hours of "such loss of time, and (*b*) in the event of such loss of time "taking place at a port in the United Kingdom or in parts in "the British Empire overseas and continuing beyond such

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(1) Ante p. 7.

" seventy-two hours, half-hire will be paid for a further period " of seventy-two hours, but thereafter hire shall cease until " the vessel is again ready to resume her service. Owners " shall not be entitled to claim hire under this clause more " than once during every round voyage or any period of " three months, whichever period be the shorter."

Under the charter-party the shipowners had to place the vessel at the disposal of the charterer in every way fitted for ordinary cargo service, with a full complement of officers and crew.

By cl. 4, while the vessel was on hire the charterer was to provide and pay for all coals. By cl. 9 the master was to prosecute all voyages with the utmost despatch and to render customary assistance with the vessel's crew. In dealing with bills of lading, the charter-party provided: " If the charterer " has reason to be dissatisfied with the conduct of the master, " officers, or engineers, the owner, on receiving particulars of " the complaint, promptly to investigate the matter, and, if " necessary and practicable, to make a change in the " appointments."

On December 16, 1943, while the *Ilissos* was subject to the charter and was ready to sail from Newcastle, Australia, her officers and crew refused to sail except in convoy—and because of this refusal the vessel remained at Newcastle until December 23, 1943, when the officers and crew agreed to proceed without convoy. There was at all material times a full complement numerically of officers and crew, but they were not willing to work, and, consequently, the vessel was unable to perform the service immediately required. The delay at Newcastle was for six days, seven hours and thirty-two minutes.

The owners claimed the full hire and the claim was resisted by the charterer. The dispute was submitted to arbitration and the arbitrator held that there was not at any material time a " deficiency of men " or " other accident " within the meaning of cl. 11A and that the charterer was not relieved by the provisions of that clause and of cl. 34 from the payment of the full hire. The arbitrator made his award in favour of the shipowners in the form of a special case for the decision of the High Court, in para. 7 of which were set out the two questions asked of the court: (A.) " Whether on the facts found by me " and on the true construction of the charter-party the " claimants are entitled to recover 388*l.* 17*s.* 6*d.*"; and (B.) " Whether on the facts found by me and in the true con-

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"struction of the charter-party, the respondent is entitled to "recover 964*l.* 6*s.* 1*d.* from the claimants." Sellers J. upheld the decision of the arbitrator (1) but he stated in the course of his judgment that (2): "The inability of officers and men to "work through sickness or injury would, in my view, amount "to 'deficiency of men' and the clause would apply if the "working of the vessel was hindered or prevented thereby, "and it would make no difference if the incapacitated members "of the crew were on the ship or in hospital on shore." Accordingly he answered the first question in the affirmative and the second in the negative—both questions in favour of the shipowners. The charterer appealed.

Eustace Roskill for the charterer, the respondent.

Sir Robert Aske K.C. and *Mocatta* for the owners, the claimants.

The argument was that advanced before Sellers J., a summary of which will be found at pp. 9 and 10 ante.

BUCKNILL L.J. In my opinion the decision of Sellers J., supporting the view taken by the arbitrator, was right. If the dictionary is consulted the word "deficiency" is given a variety of meanings. The question is what meaning are we to give to that word in this charter-party. On that issue I cannot do better than cite the passage in art. 6 of Scrutton on Charter-parties (15th ed.). "The construction to be given "to charters and bills of lading is not an unnecessarily strict "one, but such a one as with reference to the context "and the object of the contract will best effectuate the "obvious and express intent of the parties. They are to be "construed according to their sense and meaning as collected "in the first place from the terms used, understood in their "plain, ordinary and popular sense." Those words were cited with approval by Bray J. in *Mendl & Co.* v. *Ropner & Co.* (3) who then said: "Being commercial documents the "terms used must be understood in a business and practical "sense." Looking at the words as they stand, and endeavouring to give them a meaning which practical business men would give them. I think that "deficiency of men" means "deficiency of men"; it does not mean "deficiency of

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(1) Ante p. 7.
(2) Ibid. 12.
(3) [1913] 1 K. B. 27, 32.

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"willingness in men to work." There is no doubt that the men on board this ship amounted to a full complement of officers and crew. That is what the owners agreed to provide—a full complement of officers and crew, and they did provide them. These men by a mere change of mind would have been competent at once to work this ship. It was not even as if they were sick. I am not sure that I agree with Sellers J. when he said that inability of officers and men to work through sickness or injury would amount to "deficiency "of men"; but we have not to decide that point because these men were not sick. They were quite able and competent to do their work. Therefore, I think, giving the words "deficiency of men" their ordinary sense, the facts in this case do not come within those words.

Then one has to look at the general lay-out of the charter-party. As Sir Robert pointed out, the cardinal rule in interpreting such a charter-party, is that the charterer must pay hire for the use of the ship, unless he can bring himself clearly within the exceptions. If there is a doubt as to what the words mean, then I think those words must be read in favour of the owners, if the charterer is attempting to cut down the owners' right to hire. In that connexion, I attach considerable importance to the words in cl. 34. To illustrate the way in which the courts have interpreted words of this kind, which it is alleged cut down the liability to pay hire, rather strictly against charterers, I refer to *Radcliffe & Co.* v. *Compagnie Generale Translantique* (1) where the words considered were very much like these—"loss of "time from deficiency of men or stores." In that case it was contended that there was a "deficiency of men," because the gunners who had to man the guns to protect the ship against enemy submarines were not available. Bankes L.J. said (2) "And as for the alleged deficiency of men, I think it is clear "from other clauses in the charter-party that the word 'men' is "only intended to include officers, seamen, firemen, or others "who would properly constitute part of the crew." So in this case the word "men" in cl. 11A must be read as meaning "officers and crew." If one looks at the language of cl. 34, which is an addendum to cl. 11A, it provides that: "Notwith-"standing the provisions of cl. 11A it is agreed that in the "event of loss of time due solely to inability to get or to "complete a crew (*a*) full hire will be paid for the first

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(1) (1918) 24 Com. Cas. 40. (2) Ibid. 44.

"seventy-two hours of such loss of time . . . ." I think the fair reading of the two clauses is that the "deficiency of "men" means a deficiency "due to inability to get or to com-"plete the crew." In other words, the phrase deals with a deficiency in the full complement and not with the unwillingness of a full complement to work.

In dealing with bills of lading, the charter-party provides that: "If the charterer has reason to be dissatisfied with the "conduct of the master, officers, or engineers, the owner on "receiving particulars of the complaint, promptly to investi-"gate the matter, and, if necessary and practicable, to make "a change in the appointments." The clause does not provide that if the conduct of the master, officers, or engineer causes delay or disuse of the ship, the ship is to come off hire. The clause might have so provided; but it did not do so. If this charter-party has been made in peace-time and during the voyage war was declared, if the crew declined to continue the voyage on the ground that it was dangerous, could that be considered as a case of "deficiency of men"? The full complement of officers and crew were on board and the delay and consequent loss was caused merely by their unwillingness to work. Mr. Roskill's interpretation of these words "deficiency of "men" would, I think, stretch them beyond their plain meaning.

The only other question is whether this was an accident under cl. 11A, the words of which are: "In the event of dry-"docking or other necessary measures to maintain the "efficiency of the vessel, deficiency of men or owners' stores, "breakdown of machinery, damage to hull or other accident." The learned judge in dealing with that question said (1): "The "wilful refusal of the officers and crew to sail except in convoy "does not appear to me to have any element of 'accident.' It "is not an accident and it in no way resembles any of the "other enumerated events which would serve to put the vessel "off hire." I need say no more on this issue than that I am in complete agreement with him. For these reasons, in my opinion, this appeal should be dismissed.

COHEN L.J. I am of the same opinion. Despite Mr. Roskill's able and ingenious argument, I agree with the learned judge that in the context in which it appears in this charter-party "deficiency" means numerical insufficiency. Mr. Roskill invited us to say that the word imported a qualitative as well as a quantitative element. He cited the definitions from the Oxford English Dictionary which show that the meaning he argued for is a possible meaning of the word. But I agree with Sir Robert Aske that the word "deficiency" is normally used in contrast with "sufficiency," and that, if it were desired to introduce the qualitative element the natural contrast would be between efficiency and inefficiency. I think I should have come to this conclusion from the consideration of cl. 11A by itself; but, in my opinion, that conclusion is reinforced by a reference to cl. 34, where the side-note to the clause is, "Deficiency of Crew," and the operative words, so far as material, are these: "Addendum to cl. 11A. "Notwithstanding the provisions of cl. 11A, it is agreed that "in the event of loss of time due solely to inability to "get or to complete a crew (*a*) full hire will be paid for "the first seventy-two hours of such loss of time . . . ." I think the natural meaning of the words in the body of the clause suggests that the clause is dealing only with numerical deficiency in the numbers of the crew. Reading it with the marginal note, it seems to me to throw light on the sense in which the word "deficiency" is used in this charter-party. Be it remembered that the clause is described as an "Addendum to cl. 11A." I cannot believe that the words "deficiency of crew" in the marginal note to cl. 34 are used in a different sense to the words "deficiency of men" in cl. 11A.

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(1) Ante p. 13.

I will add that, if there is an ambiguity, the ambiguity appears in an exceptions clause, and the charterer must show that he is clearly within the exceptions clause. I think the passages in the judgment in *Burton & Co.* v. *English & Co.* (1) to which Sir Robert Aske referred, are in point. The first passage is from the judgment of Brett M.R., where he said (2): "The stipulation"—in question there, which was a clause setting out that "the steamer shall be provided with a deck "load if required at full freight, but at merchant's risk"— "is in favour of the shipowners, and is in restriction of their "liability under their contract to carry. The general rule is "that where there is any doubt as to the construction of any "stipulation in a contract, one ought to construe it strictly "against the party in whose favour it has been made." Finally, at the end of Bowen L.J.'s judgment appears this passage (3): "But still, what is the sound principle to apply?

(1) (1883) 12 Q. B. D. 218.
(2) Ibid. 220.
(3) Ibid. 224.

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"Why, it is that those who wish to make exceptions in their "own favour, and by which they are to be relieved from the "ordinary laws of the sea, ought to do so in clear words; and "on that principle I think this case ought to be decided, and "my judgment goes upon the basis that the terms used here "are not clear enough to absolve the shipowners." That being so, in my opinion, Mr. Roskill's first argument fails.

So far as the alternative argument based on the words "or other accident" is concerned, I do not desire to add anything to the observations of the learned judge in the court below which have been approved by my brother Bucknill. In conclusion, I would only add this. Supposing I had been prepared to accept Mr. Roskill's first argument that "deficiency "of men" contained the qualitative element which he desires to import into it, as well as a quantitative element, I should still have felt a difficulty in giving a different effect to a somewhat similar phrase "Deficiency of Crew" in the marginal note to cl. 34. I think it would then have been necessary to have read cl. 34 as if after the word "crew" appears the words "willing to act." I see no reason for importing words into cl. 11A without performing the same operation in the clause which is described as an addendum to it. If, therefore, I had been prepared to accede to Mr. Roskill's argument and answer the first of the two questions put in cl. 7 of the stated case in his favour, I should have answered the second question against him.

SINGLETON L.J. I agree that this appeal should be dismissed, and I do not wish to add anything to that which has been said by my Lords.

Solicitor for the charterer: *The Treasury Solicitor.*
Solicitors for the owners: *Holman, Fenwick & Willan.*

C. G. M.

Applied. CURTIS v. CHEMICAL, ETC., CO. [1951] 1 K. B. 805

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OLLEY *v.* MARLBOROUGH COURT LIMITED.

Negligence—Residential hotel and boarding-house not constituting "an "inn"—Notice under Innkeepers' Liability Act, 1863 *conspicuous in hall—Notice in bedroom: "Proprietors will not hold themselves "responsible for articles lost or stolen, unless handed to manageress "for safe custody"—No exemption from liability for negligence of* *hotel servants—Contract of guest for indeterminate period, before guest sees notice—Notice not part of contract—Guest hangs bedroom key on key-board in reception office—Key stolen from key-board—Goods stolen from guest's bedroom—Lack of reasonable care by hotel servants—Onus of proof.*

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A notice in the bedroom of a private residential hotel stated: "The proprietors will not hold themselves responsible for articles "lost or stolen, unless handed to the manageress for safe custody. "Valuables should be deposited for safe custody in a sealed "package and a receipt obtained." A notice pursuant to s. 3 of the Innkeepers' Liability Act, 1863, was conspicuously displayed in the hall of the hotel. It was found that the house was not an inn at common law.

A man and his wife, on arrival at the hotel as guests, in accordance with the custom of the hotel paid for a week's board and residence in advance. They then went upstairs to the bedroom allotted to them, where the first-mentioned notice was displayed.

Held, by SINGLETON and DENNING L.JJ., that the terms of the notice in the bedroom formed no part of the contract made between the guests and the proprietors of the hotel. The contract had been made before the guests could see the notice. It was for an indeterminate period, to which an end could be put by notice on either side, and the terms of the notice in the bedroom could form no part of the contract until that contract had been so terminated.

Per DENNING L.J.: Persons who rely on a contract to exempt themselves from their common law liability must prove that contract strictly. The best way of proving such a contract was by a written document signed by the party to be bound. Another way was by handing to him before or at the time of the contract a written notice, specifying its terms, and making it clear to him that the contract was on those terms. A prominent public notice which was plain for him to see when he made the contract or an express oral stipulation would, no doubt, have the same effect. But nothing short of one or other of these three ways would suffice.

On the issue of construction of the notice in the bedroom *Held* by BUCKNILL L.J., that a person reading the two notices, (that in the bedroom and that in the hall) would not think that the notice in the bedroom was intended to exempt the proprietors of the hotel in respect of loss or theft due to the negligence of their servants; and by SINGLETON and DENNING L.JJ. that, on the assumption that the house was not a common inn, the notice in the bedroom did not exempt the proprietors of the hotel in respect of loss or theft due to the negligence of their servants.

A resident guest at this hotel closed the self-locking door of the bedroom, went downstairs and hung the Yale key of her bedroom door on the hook marked with the number of her room on the key-board provided for that purpose in the reception office. She then left the hotel. On her return she found the key missing from the key-board and certain furs and other property of hers

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missing from her bedroom. It was found that the property had been stolen by a stranger through the negligence of the hotel proprietors' servants.

Per DENNING L.J. : As to the negligence of the hotel company and the onus of proof—When the plaintiff put the key of her room on the hook in the reception office, she put it in charge of the hotel company. It gave access to her room, and it was their duty to take reasonable care to see that it was not taken by any unauthorized person. It was so taken, and consequences followed which might reasonably have been foreseen, viz., the thief used it to get into the bedroom and steal. At common law the hotel proprietors were liable for the loss, unless they discharged the burden of proving that they took reasonable care of the key.

Appeal from Oliver J.

The plaintiff Mrs. V. E. Olley and her husband stayed as guests for reward in the defendants' hotel, which had about a hundred rooms and was mainly residential, from May, 1945, to February, 1947. When they first went to the hotel they were asked in accordance with the custom of the hotel to pay for a week's board and residence in advance. That they did and then proceeded to the bedroom allotted to them. On November 7, 1945, at about 11 a.m., the plaintiff left her bedroom on the third floor, closed the self-locking door, went downstairs to the hall and thence into the reception office, hung the Yale key of her room on the hook marked with the number of her room on the keyboard provided for the purpose, and went out of doors. To one entering the hotel by the main entrance there was a lounge on the right and the reception office faced the entrance, with an " L " shaped counter enclosing it. Access from the hall to the reception office was obtained by raising a flap in the counter. In a conspicuous place nearby there was displayed a notice complying with the terms of s. 3 of the Inkeepers Liability Act, 1863.

At about 3 p.m. on the same day a Colonel Crerer was talking with a fellow guest in the lounge of the hotel when he noticed a young man come in at the main entrance of the hotel walk straight through into the reception office, come out again, walk past the staircase to the self-operating passenger lift, and ascend therein. At the foot of the staircase as he passed was a bust of the Duke of Marlborough which the porter on duty was busily engaged in cleaning. There was a receptionist whose turn of duty it was to be at the reception office at the time when the young man entered it ; but there was no evidence whether or not she was temporarily absent at the time, since

Colonel Crerer could not see into the office from where he was seated. About a quarter of an hour after he had ascended in the lift the young man reappeared in the lounge, carrying a box which he had not had with him when he entered the lift. This fact attracted the attention of Colonel Crerer. The young man at once left the hotel.

The plaintiff returned to the hotel at about 3.30 p.m. and on going to the reception office found that her key was no longer on the keyboard. With the aid of a pass-key she entered her room and found furs, jewellery worth 50*l.*, articles of personal clothing and a hat-box missing.

In the plaintiff's bedroom behind a door leading to the washstand was a notice containing some fifteen paragraphs the first of which read : " The proprietors will not hold themselves " responsible for articles lost or stolen, unless handed to the " manageress for safe custody. Valuables should be deposited " for safe custody in a sealed package and a receipt obtained."

The plaintiff by her action claimed from the defendants the value of the articles missing, alleging that they were negligent in failing to guard or supervise the keyboard and in permitting a person unknown to enter their hotel and to leave it with the plaintiff's property. She also claimed that in the contract between the plaintiff and the defendants there was an implied term that the defendants would take proper care for the safety of the plaintiff's property in her bedroom and would keep the plaintiff's bedroom key in their custody and control and adequately guard it when it was upon their keyboard ; and she alleged breaches of that contract. The defendants denied negligence, the terms of any such contract as alleged, and any breach thereof. They further pleaded (1.) that they received the plaintiff as a guest into their hotel subject to the terms contained in the notice exhibited in her bedroom and that they were accordingly not responsible for the articles stolen, whether or not they were negligent ; (2.) that the plaintiff was guilty of contributory negligence in depositing the key on the keyboard ; and (3.) that the hotel was a common inn and they, having complied with the terms of s. 3 of the Innkeepers Act, 1863, were by the terms of that Act not liable for a greater amount than 30*l.*

At the trial the plaintiff called evidence the effect of which has been related, and one of her witnesses was the manageress of the hotel. There was evidence that the system for the deposit of keys had worked well for three years. The

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defendants did not call the receptionist or the porter referred to or any evidence. The trial judge found (1.) that the plaintiff's goods were stolen by the young man seen by Colonel Crerer, (2.) that the defendants were and (3.) the plaintiff was not guilty of negligence and (4.) that the defendants' negligence was the cause of the plaintiff's loss (5.). He held that the hotel was not an inn at common law; (6.) that the plaintiff was not a traveller but a resident at the hotel, and (7.) that though the plaintiff had notice of the contents of the first paragraph of the notice in her bedroom, the terms of that notice were ambiguous and so did not absolve the defendants from liability. Accordingly he gave judgment for the plaintiff for 329*l.* 2*s.* 0*d.*

The defendants appealed, and the plaintiff cross-appealed.

Montague Berryman K.C., *Phineas Quass* and *Dingle Foot* for the defendants. There was no evidence here of negligence on the part of the proprietors of the hotel or of their servants. The plaintiff was not bound to place her key on the keyboard. She had resided in the hotel from May to November, 1945, and well knew the conditions. It was evident that the receptionist might be called away from the reception office on some errand of duty or of necessity or have been engaged in telephoning. Neither could she possibly know by sight every resident of this hotel of a hundred rooms, perhaps some one hundred and fifty or more in number, several of whom might have arrived at the hotel on the previous day and perhaps would only stay one night. The plaintiff knew the conditions of leaving her key in the office and left it there, although she might have taken it with her in her handbag. The plaintiff was warned by the notice in her bedroom: "Valuables should be deposited for "safe custody in a sealed package and a receipt obtained." *Jones* v. *Jackson* (1). No doubt the proprietors had to take reasonable care of the guests' property, having regard to all the circumstances. *Scarborough* v. *Cosgrove* (2). As Romer L.J. said in that case (3): The proprietor is bound to carry on the business with reasonable care "having regard "to the nature and normal conduct of the business as known "to the guest, or as represented to the guest by him." The liability on the defendants was that of the proprietor of a residential hotel or boarding-house, since the trial judge found

(1) (1873) 29 L. T. 399.
(2) [1905] 2 K. B. 805.
(3) Ibid. 815.

(i.) that the house was not an inn at common law, and (ii.) that, even if it had been an inn, the plaintiff was not a traveller there but a residential guest. See *Lamond* v. *Richard* (1). There was evidence that the system of leaving keys on the keyboard had worked without untoward incident for three years. The conditions being well known to the plaintiff, if the defendants were guilty of negligence the plaintiff was equally guilty of negligence, and if the loss was caused by negligence it was so caused by the plaintiff. The duty of the proprietors is that of taking care. They must take reasonable care that the door is kept shut against thieves but the duty does not amount to a guarantee that the door will be kept shut against thieves, *Paterson* v. *Norris* (2).

The notice in the plaintiff's bedroom, of which she must have had knowledge was a part of the contract between the plaintiff and the defendants, either originally, or after the first week of board and residence had elapsed, and the contract was renewed: it was renewed on the express terms that the defendants were not responsible for articles lost or stolen unless they were handed to the manageress for safe custody. The contract would be renewed week by week. This was a residential hotel and the only liability of its proprietors with regard to their guests' property was for the negligence of themselves or their servants. The exemption in the bedroom notice must, therefore, have referred to that liability: otherwise it would have been otiose. That being so, there was no necessity for the defendants to include in the bedroom notice after the words "lost or stolen" the words "by the negligence of the "proprietors of the hotel or their servants." Unless this bedroom notice protected the defendants against their liability for negligence it could have had no effect. *Turner* v. *Civil Service Supply Association Ld.* (3); *Fagan* v. *Green & Edwards, Ld.* (4) and *Alderslade* v. *Hendon Laundry, Ld.* (5). The defendants had taken all reasonable steps to bring to the notice of the plaintiff the existence of this limitation of their liability and the plaintiff was bound by this term of their contract *Hood* v. *Anchor Lane* (*Henderson Brothers*), *Ld.* (6). Scrutton L.J. said in *Rutter* v. *Palmer* (7): "In construing an exemption "clause certain general rules may be applied: First the

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(1) [1897] 1 Q. B. 541.
(2) (1914) 30 T. L. R. 393.
(3) [1926] 1 K. B. 50.
(4) [1926] 1 K. B. 102.
(5) [1945] K. B. 189.
(6) [1918] A. C. 837.
(7) [1922] 2 K. B. 87, 92.

"defendant is not exempted from liability for the negligence "of his servants unless adequate words are used; secondly, "the liability of the defendant, apart from the exempting words, "must be ascertained; then the particular clause in question "must be considered; and if the only liability of the party "pleading the exemption is a liability for negligence, the clause "will more readily operate to exempt him." So where the only liability for which the defendant is responsible is a liability for negligence, such a condition will protect him, although negligence is not specially mentioned therein: *Reynolds* v. *Boston Deep Sea Co.* (1). Here the only liability of the defendants pleading the exemption was a liability for negligence. The notice displayed in the hall by the defendants could not be considered to be contractual, since it was only displayed pursuant to statute, to limit liability in case the defendants' hotel should be held at any time to be a common inn.

Glyn-Jones K.C. and *G. G. Baker* for the plaintiff.

[BUCKNILL L.J. The court need not trouble you on the issue of negligence on the part of the plaintiff or the defendants, but they would like to hear you on the question whether the defendants were not exempted from liability by the terms of the notice in the plaintiff's bedroom.]

The trial judge found that the Marlborough Court Hotel was not a common inn. But neither the plaintiff nor the defendants would be certain of that on November 7, 1945. The defendants by exhibition of the terms of s. 1 of the Innkeepers' Liability Act, 1863, pursuant to s. 3 of that Act, would appear to have considered that their hotel was a common inn. The plaintiff, therefore, would not read the notice displayed in her bedroom with the knowledge that the only liability against which the defendants need exempt themselves was negligence. Had the hotel been a common inn the notice could not have exempted the defendants against their negligence and that of their servants. In that case, the exemption would have applied to the liability of the defendants as insurers. The onus lies on the defendants, if they desire to exempt themselves from liability, to show that they have done so clearly and without ambiguity. As Scrutton L.J. said in *Rutter* v. *Palmer* (2): "The defendant is not exempted "from liability for the negligence of his servants, unless "adequate words were used."

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(1) (1921) 38 T. L. R. 22, affirmed (1922) 38 T. L. R. 429.

(2) [1922] 2 K. B. 87, 92.

Secondly, it was for the defendants to show that the notice in the bedroom formed part of the contract between the plaintiff and the defendants. There was no evidence that there was any contract between the defendants, the proprietors of this hotel, and the plaintiff. The husband and wife arrived together at the hotel and the presumption is that the defendants' contract was with the husband, Mr. Olley, in respect of the board and residence, both of himself and of his wife. If there were no contract between the defendants and the plaintiff, there was no contract in which could be incorporated the terms of the notice in her bedroom. If there was a contract between the defendants and the plaintiff, it must have been concluded before the plaintiff and her luggage arrived at the bedroom where she could have the opportunity of seeing the terms of the notice displayed there. Such a contract is for an indeterminate period which continues until it has been terminated by one party or the other. This contract was still continuing on November 7, 1945.

Montague Berryman K.C. in reply. The contract for board and residence was between the plaintiff and the defendants. See the judgment of Tucker J. in *Lockett* v. *A. & M. Charles, Ld.* (1).

Bucknill L.J. The trial judge came to certain conclusions of fact. The first and most important was that the defendants were negligent and that their negligence caused the loss. He said: "I think that from the point of view of a responsible "hotel this is a thoroughly bad and negligent system, to have a "rack of keys within absolutely easy access to anyone coming "into these premises to help himself or herself to." He found that the plaintiff was not guilty of negligence; he found that the hotel was not a common inn, and he found that, although the plaintiff had notice of the terms of the announcement in her bedroom relied upon in the defence, these did not absolve the defendants from liability. Each of these findings has been discussed before us.

On the main point, whether the defendants were negligent, a plan has been produced which shows the general lay-out of the ground floor of the hotel. The main entrance contains the usual swing doors. Then anyone going in when they have got into the hall can either go up the stairs into the lounge or into the cloakroom on the left, or they can go

(1) [1938] 4 All E. R. 170, 172.

on until they come to the reception office where normally, on arrival, a guest would be received. The reception office is bounded by the usual counter in the shape of an " L " and at one end of the counter there is a flap which can be raised and which will enable anybody to walk in. At the back of the reception office there is a letter rack 9 ft. long stretching right away to the wall at the further end of the office. Then, at right-angles to the rack and on the far wall there is the keyboard, and a little in front of the keyboard and rather to the right of it as you stand facing the keyboard there is an enclosed office, where we were told the accounts were mainly done. Then, according to the plan, in a conspicuous place is framed the terms of s. 1 of the Innkeepers Act, 1863, in compliance with s. 3 of that Act. I am a little surprised to see it placed in such a prominent position on the plan if, as it is now alleged, the hotel was not an inn at common law. It seems that one can get into the reception office from the back by means of three swing doors, and I suppose that entrance is used by the staff. There was no evidence given as to the general use of this keyboard. Mr. Olley in fact said that he never used it; Mrs. Olley did use it. Mrs. Olley was not invited expressly to put her key on the keyboard, but the fact that a keyboard was there with a hook with the number of her key underneath it, and the fact that the keyboard was in the reception office, seems to me to be an implied invitation to guests to use the keyboard if they were so minded.

At the foot of the staircase there is a bust of the Duke of Marlborough, and on November 7, 1945, the porter who was on duty, instead of attending to what I should have thought was his obvious job of seeing who was coming in by the main door, was engaged cleaning the bust, and had his back to the passage so that he was not able to see a certain young man who was seen by Colonel Crerer to pass from the reception office to the lift. It is remarkable that the porter was not called as a witness; in fact, the defendants did not call any evidence. What he was doing after he had finished cleaning the bust, one does not know. Other evidence as to what happened on that particular afternoon was the evidence of the manageress, Miss Robbie, who was called by the plaintiff. She said that it is the practice to have one receptionist on duty, and that when Miss Robbie went away the receptionist would be sitting in the front office. She was a Miss Alexander, an elderly lady who was thinking of retiring. But what

Miss Alexander was doing at the time this young man came in and went out does not appear, since she was not called as a witness. In those circumstances, the judge had no difficulty in finding that these goods were stolen by this young man who came in to the hotel, went upstairs and went out again, without being noticed by anybody of the defendants' staff.

Was there in those circumstances negligence on the part of the defendants? The learned judge has found negligence on the ground that the keys were within absolutely easy access to anyone coming into those premises. Speaking for myself, I do not agree with that ground, because if Miss Alexander had been on duty in the reception office she could not have failed to see this young man come in, and she could hardly have failed to ask him what he was doing, taking a key off the board. She would know that he was not a guest in the house, because the evidence is that a very large proportion of the people staying in this hotel were residents: it was a residential hotel. It may be that occasionally somebody got a bed there for the night. The porter also, if he was on duty in the hall, would have asked; he would see the young man going up and his suspicions would be aroused when he saw him come down with a hat-box or suitcase in his hand. The negligence in my opinion, is not that the keyboard was in a dangerous place, but that there was on that afternoon no watch being kept over the main entrance or the keyboard or the way upstairs to see that no stranger came in. I think the plaintiff has made out her case that on this occasion the defendants, through their agents, were negligent. The points made on this question by the defendants, if I appreciated them rightly, were, first of all, that a keyboard was placed there merely for the convenience of residents and that it might equally well have been put in the hall at the bottom of the stairs. I cannot agree with that. The position of the keyboard seems to me to indicate that it had been placed in as safe a position as it could conveniently be put. It is quite true that it was put there for the convenience of the residents, but it is far better that the room should be locked up, when the guest goes out, and I should have thought myself that hotels would much prefer that a guest should leave his key in a safe place in the hotel rather than take it out and perhaps lose it, with all the serious results which would arise from that. Then, it is said that the receptionist and the hotel porter were on duty. I do not think that the evidence bears that out at all. I do not think they were about, at any rate in any such position as enabled them to see what was going on. Then it was said that the system had worked for three years and there had been no incident of this kind before. It is often the case that people take risks and nothing untoward happens for quite a long time; then perhaps they get rather too careless and an accident occurs. I do not think the fact that a system has worked for three years proves that there was no negligence on this particular occasion. With regard to the question of contributory negligence, it was said that if the system was bad the plaintiff had adopted it. There again, I do not think that the position of the keyboard was such as to make it negligent, in itself, to put the key there. I think the plaintiff was entitled to expect that a reasonable watch would be kept on the hall and on strangers coming into the hotel. I agree with the learned judge's finding on that point.

Then one comes to the interesting question as to this notice in the plaintiff's bedroom. I do not think that Mrs. Olley ever read the notice displayed in the hall under the Innkeepers' Liability Act, 1863; in fact, I do not think that she was ever quite certain that it was there; but it is clear that it was there. The notice contained the terms of s. 1 of the Act. Anybody reading the notice would, I think, come to the conclusion, that if the guest's property were stolen through the neglect of the innkeeper the innkeeper would be liable to a greater amount than 30*l.* Up in the bedroom behind a door, leading to the washstand, but in a position where it could be seen, there was another notice. I do not know how it was headed because the photograph does not show that there is any heading, but the material clause is cl. 1, "The "proprietors will not hold themselves responsible for articles "lost or stolen, unless handed to the manageress for safe custody. "Valuables should be deposited for safe custody in a sealed "package and a receipt obtained." Then there are about fourteen other reminders as to what the guests are expected to do. It seems to me that if a very careful person had read that notice after reading the notice in the hall, he would have come to the conclusion that the notice in the bedroom was not intended to exempt the proprietors from liability in respect of loss or theft caused by the neglect of the proprietors.

I do not propose to refer to the various cases which have been cited. The case of *Scarborough* v. *Cosgrove* (1), lays it down quite clearly that the duty on the part of a boarding house keeper with reference to the property brought by a guest into his house is no more than to take reasonable care for the safety of that property. It is said that unless one reads into the notice in the bedroom something to this effect, "The "proprietors will not hold themselves responsible for articles "lost or stolen, through the neglect of the proprietors, unless "handed to the manageress for safe custody," the notice would be otiose, because it is only stating what is the position at common law. The answer to that, I think, is two-fold. First, anybody reading that notice would be entitled to couple it with the notice in the hall about the keeper of a common law inn and his liability. Secondly, if one was to interpret it as suggested, namely, by putting in the words "through "the neglect of the proprietors," it would be extremely difficult to know what was the position with reference to property handed to the manageress for safe custody. Does that mean that if the property is handed to the manageress for safe custody the proprietors will be liable only on proof of their negligence? I think the guest would be in an impossible position. How could he possibly prove what was the cause of the loss of the property which he had handed to the manageress? I myself do not think that that is the right way of reading the notice in the bedroom. In my view, it is merely a general statement on the lines of the notice in the hall, namely, that the proprietors of the hotel are not responsible for articles lost or stolen unless there has been negligence on their part causing the loss. That being so, it has no bearing on this particular case, because the loss here was caused by the neglect of the proprietors' agents.

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(1) [1905] 2 K. B. 805.

As regards the question whether this was or was not an inn at common law, the learned judge has not given any reasons for his decision that it was not a common inn. The question whether any particular house be a common inn is a question of fact. That being so, I should be very slow to disturb the learned judge's finding that this was not a common inn at the time when the plaintiff went there. There is a passage in Halsbury's Laws of England, 2nd ed., vol. 18, p. 138, para. 197: that "A house used as a 'private hotel,' that is to say, for the "reception of persons who desire to go and live there, appears "not to be an inn." I think that the evidence does establish that this was a private hotel, much more like a private hotel than a common inn. For these reasons, in my judgment this appeal should be dismissed.

SINGLETON L.J. I am of the same opinion. The defendants are the keepers of an hotel known as Marlborough Court Hotel, Lancaster Gate, and the plaintiff was a guest in that hotel. She, like many others, lived there for months on end and she knew the place quite well. It was her habit to leave her key in the reception office when she left the hotel. In the reception office there was a place provided for keys—a key rack. She knew that, and she had been accustomed to putting the key in its place upon the key rack; and she knew that that rack was at the back of the reception office. Normally, in the reception office there was one of the hotel staff, and normally there was at least one porter in the hotel on duty. We were supplied with a plan of the ground floor of the hotel. When one goes in through the main entrance, the reception office is at the back of the buildings almost directly opposite the door, and on the right-hand side there is a lounge. On November 7, 1945, the plaintiff left the hotel in the morning leaving her key as usual on the rack in the reception office. When she returned later in the day her key was missing and certain articles had been stolen from her room. During the course of the afternoon another guest at the hotel had seen someone go to the reception office, enter the reception office, come out after a very short space of time, then go to the lift and apparently use the lift, and about a quarter of an hour later that same person came from the lift carrying a bag or parcel, or something of that kind. The learned judge on the evidence found that that person was the person who had taken the key of Mrs. Olley from the key rack, and had then gone to her bedroom and stolen her goods. At that time of day there ought to have been someone on duty in the reception office. It may be there was. The witness, Colonel Crerer, who saw this man, could not see whether anyone was on duty in the reception office at that moment or not, by reason of his position in the lounge; but there was during the afternoon someone on duty. If that person who was in charge of the reception office left the reception office for some good purpose, she ought to have told the porter. The porter at the time was cleaning the bust of the Duke of Marlborough. Either the lady receptionist left the reception office without telling the porter or, if she was in the office, she ought to have seen the unknown man who went to the key rack and took the plaintiff's key and who later came down in the lift and disappeared with the plaintiff's goods. Those facts are, in my view, ample to support the finding of negligence against the defendants; and, indeed, they made no answer. The defendants might have called the receptionist; they might have called the porter who was on duty; they might have given some evidence as to the general system. They called no evidence whatever. They left the case just where it stood at the end of the plaintiff's evidence, having, of course, obtained some admissions by cross-examination. The trial judge found that the defendants were negligent. I cannot see any answer to that. I think there was the clearest evidence of negligence and the judge was justified in finding it, the plaintiff's evidence being as it was, uncontradicted.

In those circumstances I do not consider that any good purpose would be served by embarking upon a diligent inquiry as to whether the defendants carried on at the time a common inn or a guest house or boarding house. If their establishment was a common inn, and if they were negligent in the conduct of that, they would lose the protection of the Innkeepers' Liability Act, 1863, s. 1. If it was not a common inn, but something less than that, they are responsible, as I read the authorities, for negligence. A number of authorities from *Scarborough* v. *Cosgrove* (1), downwards would seem to show the measure of their responsibility. This court had to deal with the question in the case of *Scarborough* v. *Cosgrove* (1), and Collins M.R. said that there was a duty on the part of the boarding house keeper to take reasonable care for the safety of property brought by a guest into his house—to take reasonable care. If in such circumstances the boarding house keeper fails to take reasonable care he is guilty of negligence. Romer L.J. put the matter a little differently, though the result was the same. I think it is right to read a few lines of his judgment because it seems to me apposite to this case. He said (2): "Seeing that the landlord carries on his "business of a boarding house keeper for reward, I think he is "bound to carry on that business with reasonable care, having "regard to the nature and normal conduct of the business as "known to the guest, or as represented to the guest by him; "and if, by reason of a breach of that duty on his part, the "luggage is lost I can see no reason why he should not be held "liable for the loss to the guest." The Lord Justice said: "I think he is bound to carry on that business with reasonable "care." So it seems to me that, if this was a boarding house, the defendants were bound to carry on that business with reasonable care, which would include reasonable care of a part of the hotel in which they had by implication invited guests to leave keys of bedrooms.

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(1) [1905] 2 K. B. 805. (2) Ibid. 815.

Therefore, I do not think it desirable to examine in detail the question whether this was a common inn or a boarding house In either event the defendants are responsible for negligence, subject to this further and more difficult question. Mr. Berryman on behalf of the defendants raised a question as to the true effect of a document which was exhibited in the bedroom occupied by the plaintiff and her husband. That document was inside some sort of cupboard which hid the washstand in the bedroom. That began in this way: "The proprietors "will not hold themselves responsible for articles lost or "stolen unless handed to the manageress for safe custody. "Valuables should be deposited for safe custody in a sealed "package and a receipt obtained." I agree with what my Lord said, that the terms of that notice at its commencement are rather more like something embraced in a notice under the Innkeepers' Liability Act, 1863, than anything else. Mr. Berryman submitted that those words which I have read should be read into the contract between the plaintiff and the defendants and that, if they were so read, they must be or ought to be regarded as freeing the defendants from their own negligence, and he cited a number of authorities in support of that proposition. The most useful, perhaps, was a case in the Court of Appeal, *Rutter* v. *Palmer* (1), where Scrutton L.J., dealing with a somewhat similar question, said (2): "In construing an exemption "clause certain general rules may be applied: First the "defendant is not exempted from liability for the negligence "of his servants unless adequate words are used; secondly, "the liability of the defendant apart from the exempting "words must be ascertained; then the particular clause "in question must be considered; and if the only liability "of the party pleading the exemption is a liability for "negligence, the clause will more readily operate to exempt "him."

Mr. Berryman submitted that upon the finding of the judge the defendants were the keepers of a guest house and their only liability could be for negligence and, therefore, the effect of the words at the head of the notice, embraced in the contract as they should be, must be to exclude the defendants from

(1) [1922] 2 K. B. 87. (2) Ibid. 92.

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liability for negligence. I confess that I feel some difficulty about those words of Scrutton L.J., "secondly, the liability "of the defendant apart from the exempting words must be "ascertained." If one has to look back now and say what the defendants were in the year 1945 and construe the contract with that in mind, well and good; it might be necessary to consider more seriously whether they were keepers of a common inn or merely boarding house keepers; but I find it a little difficult to ascertain what the true contractual basis would be if in fact they were keepers of a boarding house, when quite clearly from the notice they exhibited in the entrance hall of the hotel they regarded themselves as keepers of a common inn; and so too might the plaintiff be expected to regard them, having regard to what they exhibited in the hotel. Thus it is not easy to see the basis of the contract. I am more attracted, I confess, in considering this matter by the earlier words of Scrutton L.J.: "First, the defendant is not "exempted from liability for the negligence of his servants "unless adequate words are used." If the defendants, who would prima facie be liable for their own negligence, seek to exempt themselves by words of some kind, they must show, first, that those words form part of the contract between the parties and, secondly, that those words are so clear that they must be understood by the parties in the circumstances as absolving the defendants from the results of their own negligence. On both those points it seems to me that the defendants' argument fails. It is clear that when the plaintiff and her husband went to the hotel they had not seen the notice. Apparently, by the custom of the hotel, they were asked to pay a week in advance, and when they went to the bedroom for the first time they had not seen the notice, and the words at the head of the notice could not be part of the contract between the parties. Then when did they become so? I asked Mr. Berryman, and I am afraid it was not a very easy question to answer; he might say it was at the end of the first week when the second payment was made and the notice was seen, although the plaintiff said she did not read the notice. But there ought to be some certainty in a matter of this kind, and there is none. I do not attach great importance to Mr. Glyn-Jones's point as to the husband in all probability being the payer, the contracting party. If he was, I am inclined to think he would have contracted in this regard on behalf of his wife. But I do think there is more importance

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in his further submission that this contract when it was entered into was not a contract for a fixed period subject to renewal, but was a contract for an indeterminate period to which an end could be put by notice, and an end was not put to that contract by notice at the time this loss took place. Indeed, the conditions so far as one knows remained the same. I do not think it is open to the defendants to place reliance upon that notice in the bedroom or, at least, I do not think they are exempted by the words at the head of that notice from their liability for negligence. I agree, if I may say so, with what my Lord said upon the subject, and I attach even more importance to the fact that this was no part of the contract at the time when the parties first went into the bedroom; and there is no evidence to show that there was ever any alteration whatever in the terms of that contract. I agree with the submission which Mr. Glyn-Jones made that it is for the defendants to show that these words formed part of the contract and that they had only one clear meaning. I think they are ambiguous in more ways than one. That is all I need say upon that side of the case.

There is one further matter. It was submitted on behalf of the defendants that the plaintiff herself must have been guilty of negligence if the defendants were guilty of negligence. I do not so regard the position. The plaintiff in leaving her key upon the key rack was entitled to expect that the defendants would perform their duty and carry on their business reasonably having regard to the circumstances, as Romer L.J. said in *Scarborough* v. *Cosgrove* (1). She was entitled to expect them to perform their part of the contract. In leaving her key upon the key rack she was doing that which the defendants, by inference at least, asked her to do. I see no evidence of any contributory negligence on her part.

DENNING L.J. I agree. When Mrs. Olley put the key of her room on the hook in the reception office, she put it in charge of the hotel company. It gave access to her room, and it was their duty to take reasonable care to see that it was not taken by any unauthorized person. It was so taken, and consequences followed which might reasonably have been foreseen—a thief used it to get into the room and steal. At common law the hotel company are liable for that loss unless they prove that they took reasonable care of the key. They have not proved it.

(1) [1905] 2 K. B. 805, 812.

They did not call either the receptionist or the porter to explain how the key came to be taken.

The only other point in the case is whether the hotel company are protected by the notice which they put in the bedrooms, "The proprietors will not hold themselves responsible for "articles lost or stolen, unless handed to the manageress for "safe custody." The first question is whether that notice formed part of the contract. Now people who rely on a contract to exempt themselves from their common law liability must prove that contract strictly. Not only must the terms of the contract be clearly proved, but also the intention to create legal relations—the intention to be legally bound—must also be clearly proved. The best way of proving it is by a written document signed by the party to be bound. Another way is by handing him before or at the time of the contract a written notice specifying its terms and making it clear to him that the contract is on those terms. A prominent public notice which is plain for him to see when he makes the contract or an express oral stipulation would, no doubt, have the same effect. But nothing short of one of these three ways will suffice. It has been held that mere notices put on receipts for money do not make a contract. (See *Chapelton* v. *Barry Urban District Council* (1).) So, also, in my opinion, notices put up in bedrooms do not of themselves make a contract. As a rule, the guest does not see them until after he has been accepted as a guest. The hotel company no doubt hope that the guest will be held bound by them, but the hope is vain unless they clearly show that he agreed to be bound by them, which is rarely the case.

Assuming, however, that Mrs. Olley did agree to be bound by the terms of this notice, there remains the question whether on its true interpretation it exempted the hotel company from liability for their own negligence. It is said, and, indeed, with some support from the authorities, that this depends on whether the hotel was a common inn with the liability at common law of an insurer, or a private hotel with liability only for negligence. I confess that I do not think it should depend on that question. It should depend on the words of the contract. In order to exempt a person from liability for negligence, the exemption should be clear on the face of the contract. It should not depend on what view the courts may ultimately take on the question of whether the house is a common inn or a private hotel.

(1) [1940] 1 K. B. 532.

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In cases where it is clearly a common inn or, indeed, where it is uncertain whether it is a common inn or a private hotel, I am of opinion that a notice in these terms would not exempt the hotel company from liability for negligence but only from any liability as insurers. Indeed, even if it were clearly not a common inn but only a private hotel, I should be of the same opinion. Ample content can be given to the notice by construing it as a warning that the hotel company is not liable, in the absence of negligence. As such it serves a useful purpose. It is a warning to the guest that he must do his part to take care of his things himself, and, if need be, insure them. It is unnecessary to go further and to construe the notice as a contractual exemption of the hotel company from their common law liability for negligence. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the defendants: *Hair & Co.*
Solicitors for the plaintiff: *Gardiner & Co.*

C. G. M.

C. A.

BEAMAN v. A.R.T.S., LIMITED.

1949
Jan. 12, 13, 14, 17;
Feb. 14.

Lord Greene M.R., Somervell and Singleton L.JJ.

Limitation of actions—Bailees' conversion of chattels—Failure to inform the bailor—Action by bailor more than six years later—Bailor's right of action "concealed by fraud"—Action not barred—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 3, 26.

The plaintiff when about to proceed to Turkey in 1935 deposited five packages with the defendants for safe custody and to be sent to her as soon as she gave notice requesting it. One package was sent but owing first to regulations in Turkey and afterwards the outbreak of war the other packages could not be sent. On the entry of Italy into the war in 1940 the defendants, as being a company controlled by Italian nationals, had their business taken over by the Custodian of enemy property. Owing to a desire to wind up the business as much as possible, the manager by the direction of the secretary examined the packages and after he had reported that they were of no value, he handed them over to the Salvation Army. No steps were taken to obtain the plaintiff's consent to this or to communicate with her then or thereafter when Italy was defeated and the Mediterranean open. The plaintiff did not return to England until 1946 and after some delay in ascertaining what had become of the packages commenced proceedings more than six years after the packages were disposed of, claiming damages for conversion. The defendants set up the defence that the action was barred by s. 3 of the Limitation Act, 1939. In reply the plaintiff relied on s. 26 of the Act which provides that where " (*a*) the action is based on fraud of the " defendant . . . . or (*b*) the right of action is concealed by the " fraud of any such person . . . . the period of limitation shall " not begin to run until the plaintiff has discovered the fraud " . . . ."

Held (1.) that the action for conversion was not " based on fraud " so that s. 26 (*a*) had no application ; but (2.) that the action of the defendants in making no attempt to obtain the plaintiff's instructions before disposing of her property for their own convenience and in breach of the confidence imposed on them, and not informing her of what they had done at any time thereafter constituted a reckless " concealment by fraud " of the right of action within s. 26 (*b*). Therefore the plaintiff's action was not barred.

Bulli Coal Mining Company v. *Osborne* [1899] A. C. 351 considered and applied.

Decision of Denning J. reversed on the second point.

APPEAL from Denning J.

In November, 1935, the plaintiff, Mrs. Beaman, before leaving for Istanbul deposited with the defendants, A.R.T.S., Ld., several packages to be sent overland to her as soon as she gave notice requesting it. In May, 1936, the defendants at her request dispatched one of the packages, but afterwards the Turkish authorities made regulations which prevented the dispatch of the other packages and the plaintiff asked the defendants to hold the remaining packages, perhaps in store, pending further instructions. Three years later the defendants, who had in the interval received no further instructions, wrote to the plaintiff suggesting that they should insure the contents of the packages on her behalf and intimating that it would be necessary for her to declare the value and state if there were any articles of value. The plaintiff did not, however, insure the packages or declare any valuables. She said she was hoping to return to England, but the outbreak of war while she was still in Turkey prevented this. In June, 1940, Italy came into the war and the Mediterranean being closed for all practical purposes communication between the plaintiff and the defendants became impossible. At the end of 1940 the plaintiff went to India and remained there until the end of the war. In 1940 and 1941 she wrote several letters to the defendants which they never received. Meanwhile, on the entry of Italy into the war the defendants' business became vested in the custodian of enemy property by reason of its being controlled by Italian nationals. Most of the staff had gone into the fighting services and Mr. Ingram, the managing clerk, was about to be called up. He was therefore concerned to wind up outstanding matters, as far as possible, and (after consulting the secretary Mr. Sayers) decided to open the packages and examine their contents. The reasons given in evidence for doing this were that storage charges were mounting up, that there was imminent danger of invasion and bombing, and that there was no prospect of getting into touch with the plaintiff for a long time. He said that on opening them he found the contents to be of little or no value and arranged for them to be given to the Salvation Army, as was done in August, 1940. In fact he found, as he stated, the packing to be loosely done and repacked the packages so as to leave one box empty which he took for himself.

About six years later the plaintiff returned to England and applied to the defendants for her packages and on their failure to produce them brought an action on November 20, 1946, claiming damages for conversion. She valued the packages and their contents at 3,544*l.* 15*s.* 0*d.*, including a necklace and earrings worth 1,000*l.* and other articles of great value. The defendants set up the defence that the action was barred under s. 3 of the Limitation Act, 1939, but the plaintiff alleged that there had been fraud and relied on s. 26 of the Act to prevent time beginning to run until she had discovered the fraud (1). Denning J. held that the action for conversion in the present case was not " based on fraud " within s. 26 (*a*) of the Limitation Act, 1939. " Fraud " always imputed an element of moral turpitude such as a deliberate untruth or some dishonesty. It was not used in the narrow sense of fraudulent misrepresentation. Nor had the right of action been concealed by fraud within s. 26 (*b*), there having been no fraud by the defendants or their agents. It followed that plaintiff was not entitled to the protection of s. 26 and the plaintiff's right of action was barred by s. 3 of the statute. The plaintiff appealed.

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(1) Limitation Act, 1939, s. 3, sub-s. 1 : " Where any cause of " action in respect of the con- " version or wrongful detention of " a chattel has accrued to any " person, and, before he recovers " possession of the chattel a further " conversion or wrongful detention " takes place, no action shall be " brought in respect of the further " conversion or detention after the " expiration of six years from the " accrual of the cause of action " in respect of the original con- " version or detention."

Section 26 : " Where, in the case " of any action for which a period " of limitation is prescribed by this " Act, either—(*a*) the action is " based on fraud of the defendant " or his agent or of any person " through whom he claims or his " agent, or (*b*) the right of action " is concealed by the fraud of any " such person as aforesaid . . . . " the period of limitation shall not " begin to run until the plaintiff " has discovered the fraud . . . . " or could with reasonable dili- " gence have discovered it."

P. M. O'Connor and *Niall MacDermot* for the plaintiff. First, Denning J. misdirected himself in holding that there was no fraud within s. 26 (*a*); and secondly, the yardstick he has sought to use for judging fact against the interpretation of the statute was not correct. It is contended that the judge ought to have found a dishonest motive for the dealing by the bailees with the goods deposited in opening and examining them and then giving them away. These facts can bear no other interpretation. That was a wrongful and secret act by the bailees and their particular motive is irrelevant.

[LORD GREENE M.R. That would mean that every dealing by bailees with goods deposited with them would be fraud within the statute.]

It may well come to that unless the acts are done with the consent of the bailor: see *In re McCullum* (1) where there was held to have been concealed fraud under the Real Property Limitations Act, 1833. That was a case where a mother out of unwillingness that her daughter should marry a particular person directed the concealment from her that she had conveyed the property to her.

[SOMERVELL L.J. The dishonesty was the taking from a person of her property.]

So here then was the commission of a wrongful act amounting to fraud under s. 26 of the Act of 1939. The action of the bailees in dealing with any of the plaintiff's packages was wrongful and fraudulent. It was at least a wrongful act done recklessly and that would be fraud. The wrongful act here was in giving the packages away and it cannot matter what the motives were in examining the contents of the packages.

[LORD GREENE M.R. Section 26 (*a*) speaks of an action based on fraud and (*b*) on concealed fraud. Can this case come under (*a*)?]

If a bailee knowingly and wilfully disposes of his bailor's property without the knowledge of the bailor, that will amount

(1) [1901] 1 Ch. 143.

to fraud. The learned judge took the view that moral turpitude must be involved but that is unnecessary. It is sufficient that the bailees knew the goods did not belong to them and that they had no authority to act as they did in disposing of the bailor's property. Denning J. laid down three tests of the action against a defendant being based on fraud (1.) that conversion is done with the knowledge that the goods do not belong to him; (2.) that he has no authority or right to do the acts; and (3.) that the true owner is available and would not authorize the act if he knew of it. And he said it was not "based on fraud" if the defendant "honestly believed that the "true owner was not available and that the action was in the "best interests of all concerned." The third ground stated above is not, it is contended, necessary to a fraud.

[LORD GREENE M.R. For an action to be based on fraud must it not be essential to allege fraud if the claim is not to be demurrable?]

It is submitted not, but it would suffice if this case could be brought under (*b*). In *Bulli Coal Mining Co.* v. *Osborne* (1) it was laid down that the court will not hold out a reward for cunning when the concealed fraud does not become known to the injured person for many years. What is feared here is that a restricted meaning on s. 26 (*a*) will leave a gap for which protection is not given by (*b*). Under (*b*) the right of action has to be concealed.

[SINGLETON L.J. If you conceal the fact that you have taken another's property, must that not be fraudulent concealment of a right of action within s. 26 (*b*)?]

If so, that is sufficient for the purposes of the present action. The learned judge was clearly wrong in not drawing an inference of fraud. The behaviour of the defendants' managing clerk in retaining one of the appellant's trunks for his own use shows fraud. The case accordingly falls within s. 26 (*a*) of the Limitation Act, 1939, and the plaintiff's claim is not barred. Paragraph (*b*) of s. 26 does not apply unless there had been some active concealment of the act giving rise to the cause of action. *Bulli Coal Mining Co.* v. *Osborne* (1) is the first case in which it was held that the wrongful act might itself be a fraudulent concealment. In that case the appellants over a period of years had furtively and secretly taken the respondent's coal. The Judicial Committee held as no laches were attributable to the respondents in not discovering the existence of the wrongful workings, time had not run against them and they were entitled to recover the value of the coal so worked. It is submitted that if that case had come before the courts after the Act of 1939 had come into operation it would have been held to fall within para. (*b*) of s. 26 as there had been a fraudulent concealment of the cause of action. This case falls within para. (*b*) as the manner of dealing with the plaintiff's boxes amounted to a fraudulent concealment of her right of action. The decision below was based on the assumption that it was impossible to communicate with Turkey during the war. That assumption was wrong. The defendants should have written to the plaintiff telling her what they had done and could certainly have done so after Italy's defeat. They referred to Story's Equity, 3rd ed., pp. 79-81, ss. 184-188 and Winfield on Torts, 3rd ed., p. 633, para. 188.

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(1) [1899] A. C. 351, 358.

Aiken Watson K.C. and *H. J. Baxter* for the defendants. The question is what is the meaning of s. 26. For cl. (*a*) to apply the gist of the cause of action must be fraud. The action of conversion is not based on fraud. In this case there was no fraud. Paragraph (*a*) accordingly cannot apply and the appellant has to rely on para. (*b*). It is not necessary for the respondents to show that paras. (*a*) and (*b*) together exhaust all the possible cases. Parliament may not have intended to keep alive every form of relief. For para. (*b*) to apply the right of action must be concealed by fraud. Conscious wrong-doing is the essence of fraud and must be proved. *Bulli's* case (1) represents the high water mark of equitable fraud and it should not be extended. In that case there was conscious wrong-doing. There was nothing furtive in the defendants' actions here. The learned judge has found that they had acted honestly. There was, on the facts, no evidence of fraud to bring the case within s. 26 (*a*) or (*b*). Until the court has decided the meaning to be given to fraud in s. 26 (*b*) it is difficult to know what facts need entering into.

[LORD GREENE M.R. Is it not the old equitable conception of concealed fraud ?]

That is the meaning given to concealed fraud in the Real Property Limitation Act but in s. 26 (*b*) of the Act of 1939 the language is somewhat different. It is suggested that fraud must involve moral turpitude.

[LORD GREENE M.R. It is not limited to fraud which constitutes a cause of action as it was at common law. In equity

(1) [1899] A. C. 351.

it has a wide meaning. Thus when an innocent trespasser on land is questioned by the owner who has become suspicious and gives an untrue answer, there is no right of action at common law but there would be in equity for concealment of the right of action.]

The concealment must be of something giving rise to a right of action. There was no deliberate concealment here of the conversion of the plaintiff's property because it was thought impossible to get in touch with her.

[LORD GREENE M.R. There must have been power to communicate at some time between 1940 and 1946. It could certainly have been effected in 1943.]

The business of the defendants was then temporarily at an end.

[LORD GREENE M.R. The company was still in existence and there was a duty to communicate with the bailor. Mr. Ingram by annexing a trunk put himself in a position where he could not exercise a sound judgment.]

Regard must be had to all the circumstances in which the plaintiff's packets were disposed of. It is contended that fraud in s. 26 (*b*) has the ordinary meaning in Acts of Parliament and not the highly technical construction given to it in courts of equity. The whole circumstances surrounding the initiation of the conversion here showed that it was the act of panic-stricken persons who honestly thought they could not communicate with the plaintiff. Ought not Mr. Ingram's evidence to be accepted as it was by Denning J., who saw him : see as to this *Watt* (*or Thomas*) v. *Thomas* (1).

The fact is that communication with the plaintiff was thought impossible by reason of Italy's entry into the war and the prospect of its continuing for many years.

Patrick O'Connor replied.

Cur. adv. vult.

Feb. 14, 1949. Their Lordships read the following judgments.

LORD GREENE M.R. The Limitation Act, 1939, is described in its title as " An Act to consolidate with amendments " certain earlier enactments. It must not be construed as though its object was simple consolidation. In many important respects it alters the law. For example, the appropriate period of limitation in the present appeal, which arises out of an action of conversion is, as before, six years, but s. 3, sub-s. 2, goes further and extinguishes title to the "converted" chattels. All this, however, is subject to s. 26, which is the section immediately relevant to the present question. The only question raised in the present appeal is whether the plaintiff's cause of action which arose on August 14 and 15, 1940, became barred at the end of six years or is preserved by para. (*a*) or by para. (*b*) of this section. It is not suggested that six years have elapsed since the plaintiff discovered the fraud of which she contends the defendants were guilty or could with reasonable diligence have discovered it. Denning J. held that neither of the two paragraphs applied and dismissed the action.

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(1) [1947] A. C. 484.

The defendants were bailees for the plaintiff of four cases containing chattels belonging to her, which with their contents were admittedly converted by the defendants. It was agreed at the trial that if, despite the statute, the plaintiff should establish liability, the question of damages should be referred to an official referee. Accordingly, the value of the contents of the cases was not fully examined at the trial, although the plaintiff stated in evidence that they included jewellery and clothes and were of substantial value. The defendants, on the other hand, led evidence to the effect that they were, in their opinion, of no value and that in the circumstances they were justified in giving them away to the Salvation Army, together with the cases. Admittedly they took no steps to obtain any independent opinion as to the value of the goods, and made no list or record of them. Whatever the pecuniary value of the chattels may have been, the defendants were well aware that the plaintiff herself attached value to them; and, moreover, however trifling or non-existent their pecuniary value may have been, even if they had no more than a sentimental value, the duty of the defendants to keep them in safe custody was not in the least affected, and, in the circumstances, they had no right to give them away, as they did, without the consent of the plaintiff. There was no shadow of justification for what they did; and the suggestion that they had in mind the interest of the plaintiff herself in saving her the cost of storage is, in my judgment, a disingenuous suggestion as will presently appear.

It was argued on behalf of the plaintiff that the action was an action based on fraud in that the conversion was (it was claimed) a fraudulent one and that accordingly para. (*a*) of s. 26 applied.

Denning J. held that for an action to be "based upon the fraud "of the defendant" it was not necessary that fraud should be an ingredient essential to the cause of action. But he held that the allegation that the conversion itself was a fraudulent one had not been established. In my opinion the plaintiff's argument under para. (*a*) fails on the ground (not accepted by Denning J.) that the action is not based on fraud. It must be borne in mind that s. 26 is a section of general application. It applies to every sort of action which is affected by the Act. Of these many can properly be said to be based upon fraud: for example, an action for damages for deceit and an action claiming rescission of a transaction brought about by fraud. In all such cases fraud is a necessary allegation in order to constitute the cause of action. In other actions covered by the Act fraud is not a necessary allegation at all and the action of conversion is one of them. Indeed, the word "fraudulent" in connexion with conversion, however important it may be in a criminal matter is, in the civil action of conversion, so far as regards the cause of action, nothing more than an abusive epithet. I am of opinion, therefore, that the language of para. (*a*) means what it says and that the action was not based on fraud. As I take this view, the observations of Denning J. on what conduct will cause an action of conversion to become an action based on fraud for the purposes of para. (*a*) do not call for consideration. But on the quite different question whether the right of action was "concealed by the fraud of the "defendants" I must examine closely the facts of the case which bear on the conduct of the defendants.

It will be found that I take a different view of the facts from that taken by Denning J. When the relevant facts are considered in their proper perspective the conduct of the defendants did, in my opinion, amount to a fraudulent concealment of the cause of action. In taking this view I do not find it necessary to take the course which was strongly urged upon us by counsel for the plaintiff, that is, to dissent from the favourable opinion expressed by Denning J. of Mr. Ingram, called on behalf of the defendants as a witness. That opinion was, I think, confined to his conduct as a witness and cannot be extended to his actions at the time of the conversion, which could scarcely be considered as other than reprehensible. Had it been necessary for me to take a different view as to the evidence of Mr. Ingram before arriving at my conclusion, I should have had to make a careful examination of the somewhat remarkable matters to which our attention was called. Denning J., having found that the actions of the defendants were not fraudulent so as to make the action one "based upon fraud," only found it necessary to consider para. (*b*) on the assumption that the conversion was in its origin an innocent one, and that unless there was some subsequent fraudulent concealment para. (*b*) would not apply. I may say at once that no subsequent active concealment of a fraudulent nature is relied upon. This, however, does not mean that the defendants' failure to make any attempt to inform the plaintiff of what they had wrongfully done with her property is in the circumstances to be disregarded. It must be interpreted in relation to their previous actions.

But there may, in my opinion, be fraudulent concealment of a cause of action which is not subsequent to the act which gives rise to the cause of action; it may acquire its character as such from the very manner in which that act is performed. It is not, I think a right construction of the statute to confine "fraudulent concealment" to what Mr. Aiken Watson described as "fraud in the ordinary sense." This, as far as I understood him, meant fraud which, in its nature, is sufficient to give rise to an independent cause of action. This definition would exclude the wide range of conduct which before the statute was regarded in equity as so dishonest as to prevent the Statute of Limitations (or its analogous application in equity) from coming into operation. As this is an amending statute it would, of course, have been open to the legislature to effect so sweeping a change in the law. If it had done so a striking result would have followed. Provided an action was not based on fraud and provided there was not any subsequent active concealment of a fraudulent nature, the wrongdoer would have obtained the benefit of the statute, however furtively or surreptitiously the act complained of was committed. The manner in which equity treated, for example, a tort surreptitiously committed when the Statute of Limitations (or its analogous application) was pleaded is illustrated by the case of the secret abstraction of underground minerals. In *Bulli Coal Mining Co.* v. *Osborne* (1) the Privy Council had to consider such a case. If the appellant in that case had merely been guilty of trespass, the ordinary six-year period would have applied. But the very manner in which the trespass was committed was a surreptitious one, and Lord

(1) [1899] A. C. 351.

James of Hereford said (1), in delivering the judgment of the board: "The contention on behalf of the appellants "that the statute is a bar unless the wrongdoer is proved to "have taken active measures in order to prevent detection "is opposed to common sense as well as to the principles of "equity. Two men, acting independently, steal a neighbour's "coal. One is so clumsy in his operations, or so incautious, "that he has to do something more in order to conceal his "fraud. The other chooses his opportunity so wisely, and "acts so warily, that he can safely calculate on not being "found out for many a long day. Why is the one to go scot-"free at the end of a limited period rather than the other? "It would be something of a mockery for courts of equity "to denounce fraud as 'a secret thing,' and to profess to punish "it sooner or later, and then to hold out a reward for the "cunning that makes detection difficult or remote."

Denning J. in his judgment did not in terms deal with the question of fraudulent concealment as implicit in the technique adopted in committing the tort, and therefore contemporaneous with it. But his finding on the question of conversion based on fraud would, I think, have led him to the conclusion that no such fraudulent concealment took place. He absolved the defendants of the dishonesty or moral turpitude which he held to be an essential element, and his reasons appear from the following passage: "It is necessary to recapture the "atmosphere of 1940. Goods and chattels were then of small "concern compared to the lives of men. I think the defendants "quite honestly said to themselves: 'It is quite useless keeping "'these things lying in store any longer, with storage charges "'running up, doing no good to anyone, and in danger of "'being destroyed by the enemy. The goods do not seem "'to be of any real value. They have been left here for "'years. The owner when we last heard from her was in "'Turkey, but goodness knows what she is doing now or "'where we can get hold of her. The best thing to do is to "'give them away to the Salvation Army where they may be "'of some good to somebody.' Such conduct is not to my "mind dishonest. It does not involve any moral turpitude." With all respect, I cannot accept this paraphrase as an accurate presentation of the facts. It contains matters which I am bound to confess are to my mind irrelevant and it omits matters which appear to me to be of crucial importance. For example,

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(1) [1897] A. C. 351, 363.

I must respectfully suggest that the statement that goods and chattels were then of small concern compared with the lives of men is irrelevant since no question of the lives of men arose. Moreover, during the war vast quantities of chattels were placed in the safe custody of bailees and kept faithfully in places exposed to danger as great as, if not greater than, these chattels of the plaintiff. The risk that they might be destroyed by the enemy was the plaintiff's risk, not the defendants'. Denning J. appears to have under-estimated the readiness with which people deceive themselves into thinking their actions are honest, especially when their own interests are involved. He does not refer to the important commercial interest which the defendants had in acting as they did, and that appears to me to have misled him into accepting the protestations of the defendants' witnesses at their face value. The action of the defendants was, as Mr. Ingram admitted, initiated by a consideration of their own interests. They were anxious to close down their business as rapidly as possible, and the presence of the plaintiff's chattels in store with Thomas Cook & Sons on behalf of the defendants was an embarrassment of which they were obviously anxious to rid themselves. If indeed they formed the opinion that it would be beneficial to the plaintiff as well as to themselves, that belief was entertained with a recklessness which I can only attribute to self-deception on their part. They would no doubt be shocked to hear their conduct described as fraudulent. That is, however, quite immaterial. Mr. Ingram, who misappropriated one of the plaintiff's cases for his own use, was no doubt shocked when counsel described his action as stealing. No amount of self-deception can make a dishonest action other than dishonest; nor does an action which is essentially dishonest become blameless because it is committed with a good motive. It is goodness of motive that the learned judge ascribes to the defendants, and this seems to me to be the best that can be said for them on any view.

I will state the relevant matters as they appear to me. The defendants were bailees, and their duty was faithfully to perform their obligations as bailees wherever at any given moment the bailor happened to be living, and whatever the difficulty of communicating with her might appear to be. They must have known that the bailor was reposing confidence in them and the war was no excuse whatever for them to think otherwise. They must have known that the last thing the bailor would suppose was that they would be unfaithful to the confidence reposed in them. They must have known that by reason of that confidence there would be no reason for her to inquire whether or not they were being unfaithful to it. If on any ground they thought it desirable to deal with the plaintiff's goods in some manner inconsistent with their duties as bailees she would rightly expect that they would communicate with her before doing so. Yet they made not the slightest effort to do so. They had received a letter from her from her address in Istambul, dated January 31, 1940, and they replied to it on February 23, 1940. Neither Mr. Sayer nor Mr. Ingram took the slightest trouble to look at the file containing this correspondence. In cross-examination Mr. Sayer gave as his reason for not writing to her that Italy had declared war on us and the Mediterranean was closed and cut out Turkey altogether for communications of any sort. This alleged impossibility of communicating with Turkey was obviously mere guesswork. Had he made a proper inquiry on the subject he would have said so, and it is not suggested that he did. He did not take the trouble to ascertain what possibilities of communication there were, for example, by cable or by the Cape route to Cairo, which was not affected by the closing of the Mediterranean, or by the air route to Cairo across Africa. The truth in my opinion, is that Mr. Sayer, in his haste to disembarrass the defendants of a trust, which was at the moment inconvenient to perform, quite recklessly made an assumption which he thought would assist them in achieving that object without giving any honest consideration to the question whether that assumption was true or false. This brings me to what, in my opinion, is the vital matter to which, as I have said, the learned judge makes no reference, namely, the real determining object which led the defendants to act in flagrant disregard of their duties to the plaintiff. The defendants were an Italian-controlled company, and the result of Italy's entry into the war was for all practical purposes to put an end to their activities. This circumstance led Mr. Ingram (or according to him Mr. Sayer) to have the plaintiff's cases opened in order to ascertain the value of the articles and to see whether it was worth while to keep them. In giving evidence Mr. Ingram gave the following answer: "(Q.) What was the "reason for asking you to open up the customer's luggage "stored with you? (A.) Realizing that the business was "closing down and to see whether it was worth while to keep "the baggage." This, therefore, was Mr. Ingram's idea, namely, that the company were entitled to disembarrass themselves of all obligations of safe custody in respect of chattels which might interfere with the closing down of the business provided that he considered their value or lack of value to be such as to make it "not worth while to keep them."

I do not pause to consider whether in any event any honest judgment in the matter can properly be attributed to Mr. Ingram, who, before any delivery to the Salvation Army took place, emptied one of the cases, shifted its contents into the other three, and appropriated the case for his own use, keeping it, unknown to the plaintiff, until he produced it at the trial. In view of this, it seems odd that he should class the plaintiff's property as valueless—part of it, at any rate, he seems to have found of value to himself. It is also to be noted in connexion with this case that the order of Thomas Cook & Sons, Ld., was to deliver to the Salvation Army specified "four packages" while in the only record kept by the defendants, consisting of a note passed to their bookkeeper by Mr. Ingram, the four packages are referred to as "goods "worthless—given away," the truth being that one item had been misappropriated by Mr. Ingram himself. I do not, however, find it necessary to take this incident into account save as throwing light on the honesty of Mr. Ingram's judgment in deciding that the goods were valueless. Mr. Ingram put the responsibility for deciding to give the goods away on Mr. Sayer, and as I understand the learned judge he must have preferred Mr. Ingram's evidence on this point to that of Mr. Sayer, who denied that he acted save as an adviser on his occasional visits to the office. Mr. Sayer admitted that he gave instructions to Mr. Ingram to open the cases and ascertain the condition and value of the goods. The reasons which he gave for this are remarkable. When asked why he gave those instructions he said: "Those goods had been in our store since 1935 and a "large sum of storage charges had accrued on them." This was not the case. The charges amounted to some 2*l*. 10*s*. 0*d*. a year. As appears from the defendants' letter of February 23, 1940, the sum owing for storage at that date was 5*l*. The defendants themselves were paying to Thomas Cook & Sons 1*l*. 4*s*. 0*d*. for six months. It was admitted that there was no evidence to suggest that the plaintiff would be unable to meet whatever charges might accrue due. It is obvious that Mr. Sayer had taken no steps to ascertain what the charges were or he would not have given this answer. When asked about the alleged "large sum," he said: "We were at war "and I considered that the war would last at least five years. "Mrs. Beaman, the owner, was in Turkey and it was impossible "for her to return to this country. There would be another "five years before she could get possession of the goods."

Pausing there, I ask myself whether any honest bailee could seriously have regarded this as a reason for giving away his customer's goods. But he went on to say that he had already understood from Mr. Collins and Mr. Ingram that these goods were in a very bad state of deterioration. He went on to say that he did not think that either of these gentlemen had looked inside before making this report. It was made before the war and was to the effect that "insects such as beetles had been "seen running out of the packages." He then said that the goods had been in store for five years. "I considered that "they were not in a very good state inside on account of "dampness and moths and other things." He said that he formed this idea as to "dampness" because he had an idea that the packages contained clothing and linen, and that "clothes are prone to dampness when they have been stored "a long time." Again, I ask myself whether any bailee could have honestly formed such a view on such evidence or acted upon it without proper verification particularly when the defendants, in their letter of October 27, 1938, had told the plaintiff that the packages seemed to be in perfect order. Later, he said: "The goods had been in our store for five "years. Mrs. Beaman had bothered about them not at all, "and they were likely to be there another five years." It was not true that the plaintiff had not bothered about the goods. She had written as lately as the previous January, and the defendants in February had replied to her letter. Mr. Sayer did not trouble to examine the file because he "had no time "to consult papers"; and, again, I ask myself whether a bailee in the circumstances could honestly have formed such an opinion without even taking the trouble to look up the file of correspondence. I have asked this question as to honesty three times. If it had not been for the fact to which I have referred that the dominating influence which was weighing with the defendants was, in my view, clearly the desire to obtain the commercial benefit of disembarrassing themselves of an obligation which would impede the closing down of the business, if there had been no such commercial benefit to the defendants involved, I can understand that the answer to my question might well have been in the affirmative, with the addition, perhaps, of some comment on the intelligence or the competence of the defendants as carrying on the business of bailees. But the fact that they acted with an eye to securing for themselves a commercial advantage appears to me to make all the difference. It explains what otherwise would have been inexplicable, namely, the recklessness with which they formed their conclusions. Mr. Sayer was indeed asked whether one of his visits to the defendants at this time, which he described as "sporadic," was to get rid of the plaintiff's goods, to which he gave a curious answer: "No, not to get rid of them; to "endeavour to sell them, to defray the storage charges and to "save Mrs. Beaman from further storage charges which would "be a considerable sum after another five years of war." I have already dealt with this suggestion as to "storage "charges." In five years 12*l*. 10*s*. 0*d*. would have accrued, and I cannot in the circumstances accept the statement that a desire to save the plaintiff from further storage charges formed any real element in the conduct of the defendants, however much they may have deceived themselves into thinking that it did. Had it done so, it is, to my mind, inconceivable that they would not have taken some pains at least to satisfy themselves as to the matters which I have mentioned.

I may sum up what, in my view, happened as follows. The defendants' principal purpose, if not their sole real purpose, in getting rid of the plaintiff's goods was to obtain for themselves the commercial advantage of being able to close down their business. In breach of their duty as bailees to communicate with the plaintiff before converting her goods, they recklessly and without making the slightest effort to ascertain the true position, assumed that communication was impossible, and it is noticeable that, even after the Mediterranean was opened in 1943 on the surrender of Italy, they made no attempt to let the plaintiff know what they had done. They recklessly and without taking the least trouble to verify the facts assumed (what was false and on a simple examination of the records would have been shown to be false) that the plaintiff had not troubled about her goods, and that large storage charges had mounted up and would continue to mount up which the plaintiff would be unable to pay. They recklessly formed the opinion that the goods were valueless without having any independent valuation and in disregard of the fact (which as bailees carrying on business as such they must have known) that the absence of pecuniary value could afford no justification for disregarding their obligations. And all this they did when they must have known that the plaintiff (particularly in the circumstances brought about by the war) would be relying on them to be faithful to their trust, and for that reason would be the less likely to make inquiries as to what had happened to her property. I see no reason why, if she had had any reason to doubt the integrity of the defendants, she should not have initiated inquiries much earlier than she did, and before she returned to this country. Had she done so she would have been able to serve her writ before the six years had run. Quite apart from their failure to inform the plaintiff of what they had done they made no proper entry in their own books of what they had done with the goods. All that their own entry showed was that they had been given away; it did not say to whom. This failure to make a proper record was the cause of delay in tracing what had been done with the goods when the plaintiff came to claim them. I am of opinion that the conduct of the defendants, by the very manner in which they converted the plaintiff's chattels in breach of the confidence reposed in them, and in circumstances calculated to keep her in ignorance of the wrong that they had committed amounted to a fraudulent concealment of the cause of action. When she came to claim her goods she expected to find them waiting for her. The fact that she did so expect was due to the manner in which the defendants had chosen to act. This, in the circumstances, can, in my opinion, only be described as furtive and surreptitious.

There remains one matter of detail, namely, the position with regard to the case appropriated by Mr. Ingram. Denning J. held that the conversion of this case took place only when Mr. Ingram misappropriated it, and that in doing so he acted outside the scope of his employment. With all respect, my own opinion is that the conversion of the case took place when the order was given to Cooks to deliver it together with the other three to the Salvation Army. The fact that Mr. Ingram privately intercepted the delivery of this case by telephoning to Cooks and asking them to deliver it instead at his own house does not appear to me to affect the matter. The appeal is allowed.

SOMERVELL L.J. The first question is whether a claim in conversion can come within the words of s. 26 (*a*) of the Limitation Act, 1939. The learned judge thought such a claim might be within the words if in fact fraud was involved. I construe the words " the action is based upon the fraud of the " defendant " as covering any proceeding in a court of law, including an ecclesiastical court (see s. 31) in which fraud has to be proved for the plaintiff to succeed. There may perhaps be equitable claims in which there would be scope for argument as to whether the claim was based on fraud. In an action at common law for conversion, fraud is not a necessary or relevant allegation and such an action is not, in my opinion, based on fraud. The plaintiff therefore must succeed if at all by showing that the cause of action was concealed by the fraud of the defendants or their agents within the meaning of s. 26 (*b*). I think " fraud " in this sub-section should have the same meaning as " fraud " in the Real Property Limitation Act, 1833, and in the general equitable principles on which this section of the Act is based and which it extends. Where a word has been construed judicially in a certain legal area, it is, I think, right to give it the same meaning if it occurs in a statute dealing with the same general subject-matter unless the context makes it clear that the word must have a different construction. I find no words pointing to a different construction, and therefore the principles laid down in, for example, *In re McCallum* (1) are applicable. In considering what " concealment " has to be established under para. (*b*), assistance is for the same reason obtainable from a case, such as *Bulli Coal Mining Co.* v. *Osborne* (2) where general equitable principles on this topic were considered by the Privy Council.

I will briefly recapitulate the important facts. Five packages were deposited with the defendant company by the plaintiff when she returned to Turkey, her country of origin, in 1935. It is clear from the correspondence that the plaintiff intended to have them forwarded to her after her arrival. One case was forwarded in 1936. It appears that she experienced difficulties in getting permission from the Turkish authorities to have the other cases delivered to her in Turkey. In January, 1938, the defendants assured the plaintiff that the cases would be held to her order pending delivery instructions. This was confirmed later, and in October, 1938, the defendants assured the plaintiff that the packages seemed to be in perfect order. In 1939 the plaintiff intended to return to this country. This

(1) [1901] 1 Ch. 143. (2) [1899] A. C. 351.

was prevented by the war. In January, 1940, she wrote asking if the cases could be sent to Athens, where she would go to collect them. She said she needed them very much. The defendants replied in February, 1940, giving the freight to Athens. The entry of Italy into the war a few months later made this project impossible. The defendant company, being Italian-controlled, had in effect to close down, though the company remained in existence. In August, 1940, the cases and their contents were given away to the Salvation Army, one trunk being appropriated by Mr. Ingram, an employee of the defendants.

As I have said, the learned judge regarded s. 26 (*a*) of the Act of 1939 as covering a case of conversion if the facts established that it was a fraudulent conversion, within, I assume, the criminal law. In dealing with the case on this basis, the learned judge gives his reasons for coming to the conclusion that the defendants through their servants acted honestly. It is necessary to consider these as they are relevant to the question whether there was fraud within the meaning of s. 26 (*b*). I will not set out in full the passage from the judgment already cited by the Master of the Rolls, beginning: "It is necessary to recapture the atmosphere of 1940." I cannot myself agree with the conclusion which the learned judge arrives at and sets out in this passage. I find difficulty in seeing how a man who has undertaken to keep goods which he knows to be valued by the owner, can honestly say it is quite useless to keep them. The fact that they are in danger of being destroyed by the enemy applied to all goods in store in August, 1940. The fact that goods are of no "real value," by which is clearly meant no commercial value, seems to me no possible justification for giving them away when they are known to be valued by the owner. The owner had been heard of seven months before in Turkey. No inquiries were made to see whether it was possible to communicate with her. It would be an unfortunate principle if those who had undertaken to store goods were entitled to give them away because, owing to a war, communication with the owner had become difficult or impossible. The evidence as to the reasons which led the defendants' servants to give away goods entrusted to them is far from clear. Mr. Ingram said, and here Mr. Sayer, the defendants' secretary agreed, that he was instructed by the latter to inspect the contents of the packages. He did so, and said that the total value was nil commercially. He then said that Mr. Sayer decided that they were to be given to the Salvation Army. Mr. Sayer, who was at that time serving in the Army but looked in occasionally at the office to help, denied this. He said he made no such decision but was told about it afterwards and approved. Accepting Mr. Ingram, as the learned judge did, as a reliable witness, Mr. Sayer's recollection must be at fault. In the result, the court has no direct evidence as to the reasons why the plaintiff's goods, valued by her, were given away. The only possible inference from the evidence, in my opinion, was given by Mr. Ingram, namely, that the defendants' business was closing down. They wanted therefore to get rid of the goods. They did it for their own convenience and with complete disregard of the value which the plaintiff, as shown by her letter of seven months before, attached to her property.

The learned judge said there must be some element of moral turpitude for it to be held to be fraudulent. On the whole, I prefer to confine myself to seeking to apply the word "fraud" as construed in this area in the cases to which I have referred. If necessary I would hold that, on the evidence as accepted by the learned judge, and having regard to the obligations undertaken and re-affirmed by the defendants, there was moral turpitude. I think the act done was a fraud upon the plaintiff, and this conclusion is reinforced by the fact that Mr. Ingram thought one of the trunks of sufficient value to appropriate it for his own use, and according to his evidence, found it useful. What was done was, in my opinion, a fraud upon the plaintiff within the meaning of "fraud" in this section, applying the principle laid down in *In re McCallum* (1). I appreciate that Mr. Sayer may have thought that the plaintiff might never come to claim these goods or that after the war they might be of no value to her, or of less value than the storage charges. Mr. Sayer was apparently ignorant of the value the plaintiff put on these packages as shown in her letter of January, 1940. I think any reasonable person directing himself to the facts as known would have realized that the defendants had no right to give away the plaintiff's goods and that it was dishonest to do so.

There remains the question whether the cause of action was concealed by the fraud. If Y. undertakes to store and keep the goods of X., X. is clearly entitled to assume that Y. will not give them away. If Y. does so without communicating

(1) [1901] 1 Ch. 143.

with X., he, as it seems to me, brings himself within the principle laid down in *Bulli Coal Mining Co.* v. *Osborne* (1). That case decided that it was not necessary that the wrongdoer should have taken steps to prevent detection. Regard must be had to the nature and character of the act. A wrongdoer who "chooses his opportunity so wisely and acts so warily "that he can safely calculate on not being found out for many "a long day," cannot claim the advantage of the limitation period. This seems to me to apply and to be unaffected by the fact, which I will assume in the defendants' favour, that they believed it was impossible at that time to communicate with the plaintiff. The conclusion is reinforced by the fact that no inquiries were made as to the possibility of communicating with the plaintiff at her address in Turkey in January, nor was any communication sent to that address after Italy surrendered in 1943.

I differ from the learned judge not, I think, on any question of whose evidence should be accepted, but rather as to what matters are relevant in considering whether what was done amounted to fraud within the meaning of the section. In the earlier part of his judgment the learned judge gave a brief account of the old forms of action for detinue and trover and the modern causes of action for wrongful detention and conversion. As he stated, he attempted no precise definition, and it is unnecessary to consider what he said in detail. Some of the statements made might, I think, be found to need qualification. I agree that the appeal succeeds.

SINGLETON L.J. These facts are not in dispute:

1. The defendants were bailees for reward of certain goods belonging to the plaintiff.

2. The plaintiff had paid storage charges upon them until 1938. She attached value to them and wished them to be sent to her in Greece (see her letter of January 31, 1940).

3. The parties were in fairly regular correspondence until February, 1940. On October 27, 1938, the defendants had written "during our last inspection of the packages they seemed "to be in perfect order."

4. The plaintiff was unable to return to England owing to the war.

5. On August 14, 1940, the defendants gave instructions for the four remaining packages to be delivered to the Salvation

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(1) [1899] A.C. 351.

Army. (They had sent one of the original five to her at Istambul in 1936.)

6. Three of the packages were delivered to the Salvation Army on August 15, 1940. One trunk was delivered elsewhere for Mr. Ingram, a shipping clerk of the defendants, who dealt with the matter. There is no record of the nature of the goods delivered to the Salvation Army, except that they were three packages.

7. The defendants did not tell the plaintiff what they had done with her goods; they did not make any attempt to communicate with her, either before or after they disposed of the goods.

8. Towards the middle of the year 1946 the plaintiff returned to England and tried to find her goods, without success. Thereafter letters on her behalf were written on August 29, September 3, and October 10, 1946. The defendants wrote on October 22, 1946, a letter which was quite inaccurate, except that it did state that the goods had been sent to the Salvation Army.

9. It was not until the trial of the action (May, 1948) that Mrs. Beaman learnt that one of her trunks had been taken by Mr. Ingram for his own use.

The writ was issued on November 20, 1946. The claim was for damages for conversion. The conversion took place on or about August 15, 1940. The claim is barred by the Limitation Act, 1939, unless it is within the terms of s. 26.

I do not think that the case falls under s. 26 (*a*). Conversion includes fraudulent conversion, but an action for conversion is not *based upon* fraud. It becomes necessary to consider s. 26 (*b*) and to ascertain whether the right of action was concealed by the fraud of the defendants or their agents. It is clear that the disposal of Mrs. Beaman's goods was for the defendants' purposes entirely. Maybe they wished to avoid, as they thought, further responsibility for the goods, though it must not be overlooked that Mr. Ingram took a trunk for himself. The disposal of the goods in this way was a fraud upon the owner. The reason they did not tell her what they had done with the goods was that they did not wish her to know. There was a chance that she might not come back to this country for many years. By concealing from her what they had done they concealed from her the right of action which arose upon the conversion of the goods.

The learned judge regarded Mr. Ingram as an honest and reliable witness. Another view might have been taken having regard to his acts and to the contradictions between him and Mr. Sayer; but the fact that Mr. Ingram was regarded in this light by the judge still leaves open the question as to what is the proper inference to be drawn from the concealment from August, 1940, onwards. I agree with the submission of Mr. Aiken Watson that there must be some conscious wrongdoing. There was ample proof of that: there was wilful disposition of the plaintiff's property for the defendants' own purposes, with knowledge that the property was valued by the plaintiff. It is no answer to say: "We did not think it worth "much, and so we disposed of it"; and in this regard I emphasize that on the evidence of Mr. Ingram he thought one trunk was of value to him, and he kept it. The disposition of the property was carried out furtively, or at least without the knowledge of the owner, and the fact that this had been done was deliberately concealed from her.

In my view the proper inference to be drawn in such circumstances is that the right of action was concealed by the fraud of the defendants' agents within s. 26 (*b*) of the Act of 1939, and that is the conclusion at which I have arrived.

I agree that the appeal should be allowed.

Appeal allowed.
Trial limited to question of damages referred to official referee.

Solicitors: *Murray Napier & Co.; Crawley & de Reya.*

H. C. G.

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Dec. 9, 10.
Bucknill, Cohen and Singleton L.JJ.

ARGONAUT NAVIGATION COMPANY LIMITED *v.* MINISTRY OF FOOD: S.S. "ARGOBEC."

Shipping — Charterparty — Demurrage — When loading completed — "Steamer to be loaded according to berth terms"—By rule of port all grain on 'tween decks to be bagged—Necessary for safety of ship—Grain delivered on 'tween decks at reduced flow and there bagged—Bagging continues after ceasing of delivery—Late delivery of grain charterers' fault—Loading involves all that is required in stowing—Bagging a part of the loading.

A steamer chartered to carry a bulk cargo is not loaded until the cargo has been loaded and also bagged, if so required for safety or by regulation, in the 'tween decks. In order to avoid demurrage, the bulk must be delivered in sufficient time within the lay days to allow this to be done before their expiry.

The charterparty, which was in the approved Baltimore Berth Grain form, provided " steamer to be loaded according to berth " terms . . . . and if detained longer than five days . . . . " charterers to pay demurrage." The ship was a two-deck steamship, and the port regulations at the port of loading provided that bulk grain might be carried to full capacity in all lower holds and in the feeders, but on the 'tween decks had to be stowed in bags. The bagging of grain in the 'tween decks was also necessary for reasons of safety of the ship. On the day when loading was completed, the ship, which was to carry a load of wheat, was already on demurrage; between 8.45 a.m. and 1 p.m. loose wheat was loaded for the purposes of bagging, whereby the ship was brought down to her marks at 1 p.m., and from 1 to 3 p.m. no further cargo was taken in but the wheat was bagged for stowage in the 'tween decks.

Held, affirming the decision of Sellers J., that the steamer could not be said to be loaded until 3 p.m. The loading operation was not completed until the cargo had been taken on board, and put into bags for the purposes of carriage in the 'tween decks.

Harris v. *Best, Ryley & Co.* (1892) 68 L. T. 76 applied.

C. Wilh. Svenssons Travaruaktiebolag v. *Cliffe Steamship Co.* [1932] 1 K. B. 490 followed.

APPEAL from a decision of Sellers J.(1)

By a charterparty in approved Baltimore Berth Grain form dated September 11, 1946, it was agreed between the plaintiffs, the owners of the Canadian steamship *Argobec*, and the Minister of Food as charterer that " the said steamship " should, with all convenient speed, sail and proceed to " certain named ports, including Montreal and Sorel, " one port " only, and there load, always afloat, from the charterers or " their agents, a full and complete cargo of (inter alia) wheat " in bulk and/or flour in bags." Orders as to loading port were to be given as per cl. 13 attached. The vessel was to load under inspection of underwriters' agents, at her expense, and to comply with their rules, not exceeding what she could reasonably stow and carry over and above her cabin, tackle, apparel, provisions, fuel and furniture, and being so loaded was to proceed to one safe port in the United Kingdom or on the Continent as ordered, and there deliver her cargo. The charterparty further provided as follows: " Steamer to be " loaded according to berth terms, with customary berth " despatch, and if detained longer than five days (Sundays

(1) Ante p. 14.

"and holidays excepted) charterer to pay demurrage as per "cl. 19 attached, provided such detention shall occur by "default of charterer or his agents. Notification of the "vessel's readiness must be delivered at the office of the "charterers, or their agents, at or before 4 p.m. (or at or "before 12 noon if on Saturday), vessel also having been "entered at the Custom House, accompanied by pass of the "inspector of vessel's readiness in all compartments, the "lay days will then commence at 7 a.m. on the next business "day whether in berth or not." The provision that the vessel was to load under inspection of underwriters' agents and to comply with their rules was applicable to vessels loading in United States ports only; loading of grain at Montreal, and also at Sorel, a port on the St. Lawrence some forty miles downstream from Montreal, was subject to similar regulations laid down by the port warden of Montreal. The regulations were of statutory force and enforceable by fines. They provided: "The master of any vessel intending to load grain "for any port not within the limits of inland navigation"—that is to say, any foreign port—"shall notify the port warden "and make arrangements for a preliminary survey": and: "The port warden, if requested, shall issue within 24 hours "of the completion of such preliminary survey a written "report setting out the repairs and work necessary to render "the vessel fit to carry her proposed grain cargo and any "modifications considered necessary for the erection of "shifting boards, feeders, etc." It was also "mutually "agreed that this contract shall be completed and superseded "by the signing of bills of lading . . . . which bills of lading "shall however contain" certain clauses. There was, however, no evidence that any bills of lading were signed. By the cesser clause the vessel to have "a lien on the cargo for all "freight, dead freight, demurrage or average. Charterer's "liability under this charter to cease on cargo being shipped, "except for payment of freight as per cl. 18."

The *Argobec* was a two-deck steamship, and as regards such ships the regulations provided that bulk grain may be carried to the full capacity of all lower holds, provided properly constructed feeders were fitted in the hatches and trunked in the 'tween decks. Such feeders were to contain not less than 2½ per cent., and not more than 8 per cent. of the capacity of the hold they were designed to feed. All other grain in the 'tween decks had to be in bags, complying with regulations affecting shifting boards and dunnage. Under "stowage" it was provided that: "loading the grain shall "be properly stowed, trimmed and secured." Apart from the regulation as to bagging on the 'tween decks, it was necessary for such cargo to be bagged to secure the safety of the ship and the proper stowage of the cargo. The regulations further prescribed that until the master of a vessel produced to the Canadian customs authorities a certificate from the port warden to the effect that "all the requirements of the "regulations have been fully complied with, he is unable to "secure a clearance for his vessel to leave the port of Montreal "for any port not within the limits of inland navigation." The *Argobec* was prepared for the loading of a cargo of grain before and on her arrival at Montreal, and at 1.30 p.m. on October 7 1946 a preliminary survey having been held the port warden's certificate was issued that the vessel was fit to carry a grain cargo. Written notice of readiness, coupled with the port warden's certificate, was given by the master to the defendants' agents at Montreal at 1.45 p.m. on the same day and the lay days accordingly began at 7 a.m. on October 8. No cargo was loaded by the defendants or their agents at Montreal, but in the afternoon of October 10 the master received orders to proceed on the following day to Sorel to load grain. The vessel proceeded accordingly and arrived at Sorel at 12.45 p.m. on October 11, and the master there obtained and delivered to the defendants' agents a certificate of the Sorel port warden that the vessel was ready to load a full cargo of grain as from 1 p.m. on that day. Loading then took place intermittently, by putting on board the vessel bulk wheat by means of elevators. Then the lay days expired and the vessel came on demurrage at 7 a.m. on October 15. By 8.45 a.m. on October 17 as much wheat as could in compliance with the regulations be carried by the vessel in bulk had been put on board, the holds and feeders were full and some loose wheat had been put in the 'tween decks, where the stevedores had begun bagging wheat in bags provided by the plaintiffs. As the loose wheat in the 'tween decks was bagged more loose wheat was poured in from the elevators at a rate reduced to enable the stevedores to proceed with the bagging and the last wheat was put on board at 1 p.m., by which time the vessel was down to her marks. Bagging of the loose wheat to be carried in the 'tween decks was not completed until 3 p.m. and the Sorel port warden then issued

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his certificate that all the requirements of the regulations had been complied with. In all about, 14,000 bags, containing about 28,306 bushels of wheat, were stowed in the 'tween decks. The total time actually used between 3.30 p.m. on October 11, and 3 p.m. on October 17 in putting on board the said cargo and bagging that portion of it to be carried in the 'tween decks other than in the feeders was one day, twelve hours and twenty minutes. And (by cl. 9 of an agreed statement of facts) "had the defendant or his agents had cargo "available and desired to load it, there would have been "time between 7 a.m. on October 8 or 3.30 p.m. on October 11 "and 7 a.m. on October 15 within which to have put it on "board and to have completed the bagging of the portion "to be carried on the 'tween decks required by the regulations "to be bagged. The bagging of the wheat carried in bags in "the 'tween decks was carried out by stevedores employed by "the plaintiffs" (the owners) "with all reasonable despatch "and without any default by the plaintiffs or their stevedores, "and the operation of bagging could not reasonably have been "completed before 3 p.m. on October 17."

It was agreed that the vessel was on demurrage from 7 a.m. on October 15 to 8.45 a.m. on October 17, a period of two days, one hour and forty-five minutes. The issue was as to the demurrage which the charterer ought to pay. He, had in fact, paid 617*l*. 14*s*. for the period up to 8.45 a.m. on October 17, when the vessel could not take in any more grain in bulk. The owners claimed demurrage from 8.45 a.m. to 3 p.m. on that day 77*l*. 10*s*. 10*d*., being 52*l*. 14*s*. 7*d*. until 1 p.m., when the grain ceased to be delivered and 24*l*. 16*s*. 3*d*. from 1 p.m. until 3 p.m. when the bagging was completed.

Sellers J. said that there were two questions: (1.) whether, if the lay days expired at the moment when the wheat in bulk had been put on board to the maximum amount permitted, any time occupied thereafter either in the process of allowing grain to fall slowly into the 'tween decks of a vessel to be bagged as the port regulations demanded, or the time actually occupied in stowing the cargo, after the elevators had stopped delivering, should count as loading time, and (2.) in the event of the answer to the first question being in the negative, whether it made any difference if the vessel was already on demurrage at the time when the final quantity of wheat was put on board. His Lordship held that the steamer could not be said to be loaded until the cargo had

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been loaded and bagged, if required, for safety or by regulation in the 'tween decks, and that, in order to avoid demurrage, the bulk wheat must be delivered in sufficient time within the lay days to allow this to be done before their expiry. That answered the first question. As to the second he thought that it made no difference whether the vessel was already on demurrage or not. The charterparty required that the detention should occur " by default of the charterer or his agents," and this he thought applied in all circumstances. If default were not proved, demurrage did not accrue. There must be judgment for the owners for 77*l.* 10*s.* 10*d.*

The charterer appealed.

Le Quesne K.C., *Eustace Roskill* and *Holman* for the charterer. The " loading " of the *Argobec* was completed at 8.45 a.m. on October 17, 1946. By 8.45 a.m. on October 17 " as much wheat as could in compliance with the regulations " be carried in bulk had been put on board." The charterer's contract was merely to provide the ship with grain in bulk. Once that was done, the charterer's obligation was ended. The remainder of the wheat carried on the 'tween decks had, by Canadian law, to be bagged by the owners—an act which was performed after the wheat *in bulk* had been shipped, that is " loaded " on board the ship in pursuance of the charterer's contract. Liability for demurrage came to an end when the wheat in bulk had been shipped by the charterer. Thereafter it is unnecessary to consider whether the charterer was in fault, since bagging was not part of the loading. " Loading " was treated as lifting and lowering by Lord Esher M.R. in *Harris* v. *Best Ryley & Co.* (1). If the loading was not completed at 8.45 a.m. on October 17, it was completed at 1 p.m. on that date, when the last of the wheat for bagging arrived on the ship.

By the cesser clause: it was provided that: " Vessel to " have a lien on the cargo for all freight, dead freight, demurrage " or average. Charterer's liability under this charter to " cease on cargo being shipped, except for payment of freight " as per cl. 18." It is plain that, except as otherwise provided, the charterer was granted a release co-extensive with the lien on the cargo. Sellers J. construed the word " loading " as including something more than " shipped," holding that demurrage covered detention until completion

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(1) (1892) 68 L. T. 76.

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of bagging and stowing and, therefore, a period subsequent to the time at which the cargo was shipped and at which when this clause was effective the release would operate. No doubt there was no evidence that a bill of lading was ever executed and so it cannot be said that the cesser clause ever came into force.

Secondly, it was for the owners to prove that detention beyond 7 a.m. on October 15 was due to the default of the charterers.

[*Sociedad Anonima Comercial de Exportacion y Importacion* (*Louis Dreyfus y Cia*) *Limitada* v. *National Steamship Co. Ld.* (1) was mentioned.]

Mocatta for the owners.

[BUCKNILL L.J. The court would like to hear you on the first point as to the meaning of the word "loaded" in the charterparty.]

The word "loaded" includes stowage. See Carver on the Carriage of Goods by Sea (8th ed.), p. 370, s. 250, and *C. With. Svenssons Trevaruaktiebolag* v. *Cliffe Steamship Co.* (2). The charterer cannot deposit the cargo on the ship at the last moment of the lay days and allow the ship no time for stowing it. As Lord Esher M.R. said in *Harris* v. *Best Ryley & Co.* (3): "The shipper has all the lay days in which to bring his cargo "to the ship, and, if he did not act reasonably, he might bring "it all upon the last of these days; to do so would be "unreasonable; he must act reasonably and bring the cargo "alongside in sufficient time to enable the shipowner to do "his part within the lay days." On the admitted facts here:— "Had the defendant" (the charterer) "or his agents had "cargo available and desired to load it there would have "been time between 7 a.m. on October 8 or 3.30 p.m. on "October 11 and 7 a.m. on October 15, within which to have "put it on board and to have completed the bagging of the "portion to be carried in the 'tween decks required by the "regulations to be bagged. The bagging of the wheat carried "in bags on the 'tween decks was carried out by stevedores "employed by the plaintiffs with all reasonable despatch and "without any default by the plaintiffs or their stevedores "and the operation of bagging could not reasonably have been "completed before 3 p.m. on October 17." See *Aktieselskabet*

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(1) (1932) 37 Com. Cas. 283; 38 Com. Cas. 88.

(2) [1932] 1 K. B. 490, 494.

(3) 68 L. T. 76, 77.

Reidar v. *Arcos, Ld.* (1), *Attorney-General* v. *Leopold Walford (London) Ld.* (2) and *Sociedad Anonima Comercial de Exportacion y Importacion (Louis Dreyfus y Cia) Limitada* v. *National Steamship Co. Ld.* (3).

Le Quesne K.C. replied.

BUCKNILL L.J. The parties in this case agreed on a statement of facts. On those facts, Sellers J., came to the conclusion that "loading" included the time occupied in bagging. In the course of his judgment, he said (4): "In "the case of the loading of general cargo time is of necessity "taken in placing and stowing the cargo as it arrives in the "hold. Often the delivery of cargo on board a vessel is slowed "down because of the difficulty of stowing certain kinds of "cargo or of stowing it in a place particularly difficult of "access or by reason of its structure or some obstruction. "I have never heard it suggested in such a case that in "assessing the time taken in loading for purposes of demurrage "an apportionment should take place (on some estimated "basis, for accuracy would be impossible) between time taken "in stowing and time taken in bringing the goods to the hold." Then he said towards the end of his judgment (5): "In this "case I find that loading was not completed until 3 p.m. "on October 17. The facts reveal that only one day, twelve "hours and twenty minutes was taken in actual loading, and "that the charterers were in default in not completing the "loading within the lay days. To detain the vessel beyond "the lay days was a breach of the contract by the charterers. "(*Aktieselskabet Reidar* v. *Arcos, Ld.* (1)). They remained in "default and without any protection under the charterparty "until the loading was completed. The shipowners have, "therefore, established all that is necessary for them to recover "demurrage under the relevant clause of the charterparty."

The question is whether that is a right decision. One can consider the question on the authorities or by regarding the matter as a question of principle. The leading authority, if it may be called an authority, because I agree with Mr. Le Quesne, that the passage relied upon by Sellers J., which I am

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(1) [1927] 1 K. B. 352.
(2) (1924) 18 Ll. L. Rep. 314.
(3) (1932) 37 Com. Cas. 283; 38 Com. Cas. 88.
(4) Ante p. 19, 20.
(5) Ante p. 21.

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about to read is not absolutely essential for the purpose of the decision of the case, is *Harris* v. *Best, Ryley & Co.* (1). It is a statement of the law and practice with reference to loading ships by that great master of commercial maritime law, Lord Esher M.R., made as far back as 1892. Although that is fifty-six years ago, Mr. Le Quesne, with his immense knowledge of this branch of the law, was not able to refer us to any passage by any judge or text writer or other legal authority which questioned the accuracy and good sense of what Lord Esher there said. I will read the passage in full because it is so important (2): "What is the obligation created by the agreement 'to be loaded'? Loading is a joint act of the shipper or charterer and of the shipowner; neither of them is to do it alone, but it is to be the joint act of both. What is the obligation on each of them in that matter? Each is to do his own part of the work, and to do whatever is reasonable to enable the other to do his part. This puts upon the shipper the obligation of bringing the cargo alongside the ship, and of doing a certain part of the loading. What is that part of the loading? By universal practice the shipper has to bring the cargo alongside so as to enable the shipowner to load the ship within the time stipulated by the charter party, and to lift that cargo to the rail of the ship. It is then the duty of the shipowner to be ready to take such cargo on board and to stow it in the vessel. The stowage of the cargo is the sole act of the shipowner. What is a reasonable course of action for both parties? The shipper has all the lay days within which to bring his cargo to the ship, and, if he did not act reasonably, he might bring it all upon the last of those days; to do so would be unreasonable; he must act reasonably and bring the cargo alongside in sufficient time to enable the shipowner to do his part within the lay days." That passage has been referred to with approval in the Court of Appeal by Greer L.J., in *National Steamship Co. Ld.* v. *Sociedad Anonima Comercial de Exportacion y Importacion* (3). Greer L.J. said (4): "As Lord Esher pointed out in *Harris* v. *Best, Ryley & Co.* (1), loading is 'a joint act of the shipper or charterer and of the shipowner; neither of them is to do it alone, but it is to be the joint act of both. What is the obligation of each of them in that matter? Each is to do his own part of

(1) 68 L. T. 76.
(2) Ibid. 77.
(3) 37 Com. Cas. 283.
(4) Ibid. 290.

"'the work, and to do whatever is reasonable to enable the "'other to do his part'." Then he continued: "In any "event, the use of the winch, or any other method of loading "adopted by the ship after the goods are brought alongside "by the shipper, is part of the loading." There is also a passage in the 8th ed. of Carver on the Carriage of Goods by Sea at p. 370, s. 250: "The manner in which the goods "are to be shipped is ascertained, so far as not expressly "agreed upon, by reference to the usages of the place and "having regard to the regulations and laws there prevailing. "The ordinary practice generally determines how, and by "whom, the goods are to be taken alongside and put on board. "The operation of loading a ship involves all that is required, "i.e., stowing and, *semble*, where necessary lashing—to put "the cargo in a condition in which it can be carried." The authority for that particular passage is a case decided by Wright J., *C. With. Svenssons Trevaruaktiebolag* v. *Cliffe Steamship Co.* (1). The question there was whether the loading of a particular ship had come to an end, it being a loading of a deck cargo. Wright J. (2) said: "I think that in a case "like this, and, indeed, in most cases, the mere reception or "dumping down of the cargo on the ship does not involve "the completion of the loading, because I think the operation "of loading involves all that is required to put the cargo in "a condition in which it can be carried. In this case the "operation of stowing the cargo was comparatively simple. "The pit props came up from the water in the ship's slings "and were slung on to the deck. Then the sling was released, "but, before it was released, the sling was put in such a "position that the props would fall in the proper direction— "that is, lying fore and aft—and would more or less sink "into their places. Some operation of stowing, however, "was necessary in respect of each such sling—some props "would not fall in the right position and would have to be "straightened out, and the props generally would have to be "arranged so that they would lie as closely as possible together "with their round sides as neatly in contact as could be "achieved. That was a small operation, no doubt, but it "was done sling by sling before the next sling could come on "board, and it had to be done in respect of the last load. It "might only take one, two, three or four minutes in respect "of each sling load, but it was, in my judgment, a necessary

(1) [1932] 1 K. B. 490. (2) Ibid. 494.

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" part of the operation of loading." It seems to me that those authorities all indicate that the task of loading is a joint operation, that each party must do what is reasonable to enable the other to do his part and that loading is not complete until the cargo is so placed in the ship that the ship can proceed on her voyage in safety.

Looking at the case, apart from authority, on principle, there seem to me to be two questions: first, was the loading completed at 8.45 a.m.? To my mind, it certainly was not. The loading of grain in fact continued after that time. It is true that it continued slowly, but it continued slowly because it had to be bagged. It would have been most unreasonable to have poured it in at a great speed, forming large mounds in the 'tween decks and making it difficult to bag it. It had to be bagged—there is no doubt about that. The ship could not sail unless it was bagged. If it had not been bagged, I presume the charterer would have had to remove it. I am not at all sure that, strictly speaking, the regulations might not require that the cargo should be bagged before it was put in the 'tween decks. Perhaps, from a business point of view that would be unreasonable, but the rule is clear that "all " other grain in the 'tween decks must be in bags." Therefore, as regards the time, up to 1 p.m. I think there can be no doubt that the loading was not completed.

Then the second question is: Was the loading and bagging completed at 1 p.m.? It is said on behalf of the charterer that he had then completed his contract—he had shipped all the wheat—and he had nothing more to do. If one applies the test as to what is reasonable in a case such as this, it seems to me unreasonable for the charterer to allow no time for the bagging. He ought to have put the cargo into the 'tween decks in sufficient time for the wheat there to be bagged before the five lay days had run out, but he did not do so. He acted reasonably at the time in dribbling it in. It was impossible to dribble it in in such a way that the flow ended at the precise moment when the last bag was full. The fact that there was a little cargo left over to be bagged when the full amount had been put into the ship does not seem to me to show that the loading had been completed then. In my view bagging was a part of loading. It was necessary for the safety of the ship. It was necessary in order to comply with the rules of the port warden, rules with which the charterer had agreed to comply. For these reasons, I think the judgment of the learned judge was right and this appeal should be dismissed.

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COHEN L.J. I am of the same opinion. I only desire to add a word or two on one point. Mr. Le Quesne relied on the cesser clause, which so far as material is in the following words: "Vessel to have a lien on the cargo for all freight, "dead freight, demurrage or average. Charterers' liability "under this charter to cease on cargo being shipped, except "for payment of freight as per clause 18." Mr. Le Quesne said the object of that clause was to supply the charterer with a release co-extensive with the lien on the cargo except in so far as otherwise expressly provided. He said that object would not be achieved if we adopted the construction placed by Sellers J., on the word "loaded," and gave it a different meaning to that given to the word "shipped." According to the construction adopted by Sellers J., of the word "loaded," demurrage might cover detention until completion of bagging and stowage, and therefore cover a period subsequent to the time at which the cargo was shipped and at which accordingly the release would operate. That is true, but I doubt whether it follows that the lien and the release were not co-extensive. The charterer would, I think, get release from all demurrage, whether accruing on completion of shipment or accruing thereafter, and the lien would extend to all demurrage whenever the liability for that demurrage arose. Be that as it may, that question does not really arise on the facts of this case, since the cesser clause only comes into operation when the bill of lading comes into force, and we have no evidence that a bill of lading was ever executed. Indeed, having regard to the fact that the Minister of Food was both shipper and consignee, it is highly unlikely that any effective bill of lading ever came into being. I do not think that the clause in question affords any reasonable guide to the meaning of the word "loaded" in other parts of the charterparty.

I agree so entirely with what has been said by my Lord and by Sellers J., in the court below on the meaning of the word "loaded" that I will only refer to one other short clause in the charterparty. In the early operative part of the charterparty I find this provision: "Vessel to load under "inspection of underwriters' agents, at her expense and to "comply with their rules, not exceeding what she can "reasonably stow and carry over and above her cabin, tackle, "apparel, provisions, fuel and furniture, and being so loaded "shall therewith proceed to one safe port in the United "Kingdom." It seems to me quite plain that in that clause the expression "loaded" means not only shipped but stowed. Indeed, Mr. Le Quesne, perhaps unconsciously, adopted this construction when he relied on the words in the clause "at "her expense" as imposing on the shipowner the obligation to pay for the bagging of the wheat in question, and I see no reason for giving a narrower meaning to the same word in the provisions as to demurrage. For these reasons, I entirely agree with the construction placed by Sellers J., and by my brother Bucknill on the meaning of the word "loaded," and in consequence it seems to me that, having regard to the agreed facts stated in para. 9 of the statement of agreed facts, the owners were entitled to succeed and the judgment of Sellers J. must be affirmed. I need not read that paragraph but I would point out that it expressly states: "Had the defendant or his "agents had cargo available and desired to load it, there "would have been time" within the lay days "to have com-"pleted the bagging" of the cargo to be carried in the 'tween decks. It seems to me necessarily to follow, once one adopts the meaning of the word "loaded" which was adopted, and in my opinion rightly adopted, by Sellers J., that the owners must succeed. I agree that this appeal should be dismissed.

SINGLETON L.J. I agree that the appeal should be dismissed. I think it right to say a word or two on one aspect of the case. Mr. Le Quesne raised a question as to the onus of proof. He submitted that it was not shown that the charterer was in default. It would be a matter for regret in a case of this kind, which affects other cases, if it fell to be decided on a question of onus, for it would have been quite easy to ascertain further facts even if they were not or could not be made the subject matter of agreement.

But, on examination, it appears to me that there is no substance in the point as to onus. The charterer has paid demurrage on the basis that he was in default. The clause in the charterparty is in these terms: "Steamer to be loaded "according to berth terms with customary berth despatch, "and if detained longer than five days (Sundays and holidays "excepted) charterer to pay demurrage as per cl. 19 attached, "provided such detention shall occur by default of charterer "or his agents." Cohen L.J. read just now a part of para. 9

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of the agreed statement of facts: "Had the defendant or "his agents had cargo available and desired to load it, there "would have been time between 7 a.m. on October 8 or "3.30 p.m. on October 11 and 7 a.m. on October 15 within "which to have put it on board and to have completed the "bagging of the portion to be carried in the 'tween decks "required by the regulations to be bagged." Those words alone show that the charterer was in default in that he had not provided cargo at the proper place in time or within reasonable time. These words follow in para. 9 of the agreed statement of facts: "The bagging of the wheat carried in "bags in the 'tween decks was carried out by stevedores "employed by the plaintiffs with all reasonable despatch and "without any default by the plaintiffs or their stevedores, "and the operation of bagging could not reasonably have been "completed before 3 p.m. on October 17." That makes it quite clear (*a*) that the plaintiffs, the owners, were not in default, and (*b*) that the defendant, the charterer, was at fault in that he did not provide the cargo at the time at which he ought to have done. The default of the charterer lay in not providing the cargo at the proper time and place. It was through that default that the detention occurred. The detention was due to the default of the charterer.

Appeal dismissed.

Solicitor for the charterer: *The Treasury Solicitor.*
Solicitors for the owners: *Stoke & Mitcalfe.*

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Feb. 9, 10, 11, 22.

Tucker and Singleton L.JJ. and Birkett J.

Factory—Personal injuries—Window cleaner—Independent contractor—"Safe means of access to every place at which any person has at any "time to work"—Duty of occupiers of factory or of window cleaner—Factories Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 26.

A window cleaner who had contracted to clean the windows of a factory was walking along his ladder, which was laid horizontally along the asbestos sheeting which formed the roof of a part of the factory and was the only means of access to his work, when he slipped or otherwise lost his balance and fell through the roof suffering injuries. He claimed damages against the occupiers of the factory for breach of their statutory duty under s. 26 of the Factories Act, 1937, which reads: "There shall, so far as is "reasonably practicable, be provided and maintained safe means "of access to every place at which any person has at any time "to work."

Held, that the language of s. 26 was clearly designed to include in its protection persons working in or within the curtilage of a factory whether or not they were directly employed by the occupier, and was wide enough to cover a window cleaner working as an independent contractor; that the occupiers of the factory having been guilty of a breach of their duty to provide safe means of access, nothing short of negligence by the window cleaner in the performance of his contract would suffice to relieve the occupiers from the consequences of their breach at the suit of the injured person, for whose benefit the duty was imposed; and that in the absence of evidence to support an allegation of contributory negligence on his part the window cleaner was entitled to recover damages.

Held, further, that the words of s. 152 of the Act: "'Building "'operation' means the construction, structural alteration, "repair or maintenance of a building (including . . . . external "cleaning of the structure)" were not apt to include window cleaning, which was therefore not brought by s. 107 outside the scope of s. 26.

Per Tucker L.J. I should desire to reserve for future consideration whether or not s. 26 applies to building operations carried on in a factory, as held by Denning J. in *Whitby* v. *Burt, Boulton & Hayward, Ld.* [1947] K. B. 918.

Decision of Denning J. [1948] W. N. 275 reversed.

Appeal from Denning J.

Action for damages for personal injuries.

The plaintiff, a window cleaner in business on his own account, entered into a contract with the defendants, the occupiers of a toffee manufacturing factory, to clean the windows of the factory, and agreed to provide his own ladders and "tackle." Some of the windows on the first and second floors did not open and therefore had to cleaned from the outside. For this purpose the plaintiff used his ladder to get on to the roof of the ground floor, the roofing of which consisted in part of asbestos sheets 2 ft. 3 ins. wide with a span of 4 ft. 6 ins. between the purlins to which the sheets were riveted. They were not otherwise supported. When first erected the asbestos sheets had been approved by the London County Council, but as a result of experience gained during the war the British standard specification now lays down that in the case of asbestos sheets, which are brittle and friable, the span between the purlins should not exceed 3 ft. It was stated, however, that

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there were thousands of similar roofs still in existence. Accordingly, the plaintiff, on reaching the roof, made use of a plank which he found there and also of his ladder to distribute his weight. Having cleaned the windows he was walking along on his ladder, placed horizontally along the roof, for the purpose of descending, when, according to his evidence, the asbestos roof cracked and gave way beneath him and he fell through a distance of 12 to 15 feet, on to a toffee boiler below, and sustained injuries. His claim for damages was based (1.) at common law, as an invitee, and (2.) under s. 26, sub-s. 1, of the Factories Act, 1937, by which: "There shall, so far as is "reasonably practicable, be provided and maintained safe "means of access to every place at which any person has at "any time to work."

Denning J. found for the defendants, and the plaintiff appealed.

F. D. L. McIntyre for plaintiff. The learned judge was not satisfied that the defendants had committed any breach of any duty at common law which they owed to the plaintiff, but he found that there had been a breach by the defendants of their statutory duty under s. 26 of the Factories Act, 1937, to provide "safe means of access" to the place where he was to work. Nevertheless, applying the provisions of the Law Reform (Contributory Negligence) Act, 1945, he held that the whole responsibility for the accident was on the plaintiff, who had failed to take reasonable care for his own safety. He therefore dismissed the action. The learned judge appears to have thought that the accident did not happen quite in the way described by the plaintiff, for he said: "it looks as though he "slipped off the ladder and having slipped on to the asbestos "he went through." If the plaintiff's story is correct, that he was walking along the ladder when the asbestos cracked beneath him, that the roof gave way and he went through, it is difficult to say that he was not taking reasonable care for his own safety, for he would be adopting what the expert witnesses agreed was the best method of working on this roof. At common law the obligation of the occupiers is to treat the window cleaner as an invitee and they must be taken to know that their premises were unsafe. The inherent defect in the roof was not apparent to an ordinary observer and the duty of the occupiers was, so far as reasonably practicable, to make the premises safe or to warn the plaintiff of the danger. In my

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submission the learned judge did not apply his mind to the material question: Did the occupiers take proper steps to see that their premises were safe, knowing as they did that the plaintiff would have to work on the roof? Once it is established that there was a breach of s. 26 of the Factories Act it is for the occupiers to prove that the accident was not caused by their wrongdoing. The defendants do not admit that s. 26 applies to this particular factory or to this particular plaintiff, but it is submitted that the section which is new is wide enough to cover every person who works in a factory. The whole scheme of the Act is that it applies to all persons employed or working in or on a factory.

[SINGLETON L.J. "Slipping" may not be negligence at all and the Factories Act may be intended to cover an accident due to accidental slipping or slight carelessness.]

It cannot be said that the plaintiff was negligent or that his negligence was a deciding factor of the accident. He was entitled to assume that the occupiers of the factory would carry out their statutory duty.

[*Dawson* v. *Murex Ld.* (1) and *Callaghan* v. *Fred Kidd & Son* (2) referred to.]

[TUCKER L.J. The court only desires to hear you on the question of the Factories Act, Mr. Berryman.]

Berryman K.C. and *S. Chapman* for defendants. Section 26 is not applicable to this case. The persons intended to be protected by the Factories Acts as a whole are the factory operatives and they alone. It requires very clear and precise language to indicate an extension of the class or type of persons to be covered. The words "has to work" are very ambiguous and might even be said to cover a factory inspector or a welfare officer who went on the premises in the course of his official duties. The present case is an attempt to extend s. 26 to an extent which begins to put an impossible burden on the occupiers of factories. If the section does apply to this type of work and this class of person then, it is submitted, the learned judge on the facts was right in holding that notwithstanding a technical breach of duty by the occupiers, the plaintiff, being an independent contractor, doing highly expert work and supplying his own tackle and equipment, was solely responsible for his own injury. The roof in question was not a means of access provided by the occupiers, but was the method of carrying out his contract selected by the plaintiff. Section 26

(1) [1942] 1 All E. R. 483. (2) [1944] K. B. 560, 565.

shows that what the legislature had in mind was, so far as was reasonably possible, provision by the occupier for the protection of persons over whom he had absolute control in the sense that he could direct them where to work. " Work " in the section means work in connexion with the processes carried on in the factory and not work on the outside of the premises over which the occupiers have no control. If it be held that the plaintiff himself provided what, according to the evidence of the experts, was the only safe method of access to this roof, namely, a plank and a ladder, and if, despite that, something went wrong, it could not be said that the occupiers' breach of statutory duty was the cause of the accident. *Whitby* v. *Burt, Boulton & Hayward, Ld.* (1) appears to be the only reported case in which the Factories Acts have been so extended as to be held to apply to an independent contractor. If this court feels compelled to find that the occupier committed a technical breach of his statutory duty, nevertheless the decision of the judge below should be upheld, because the plaintiff, as an independent contractor, knew that the occupier was relying on him to set out the job and provide the materials for carrying it out. There was therefore the clearest possible delegation of that statutory duty to the contractor.

[TUCKER L.J. Assuming the occupier is in breach of this absolute duty, what negligence was there on the part of the plaintiff ?]

If the plaintiff provided all that was reasonably practicable for providing a safe means of access, then he was not in breach ; but so, also, the occupier was not in breach of his statutory duty because the plaintiff had done all that was reasonably practicable. If, on the other hand, the plaintiff did not adopt the proper method of carrying out his contract then the accident was due to his own want of care. Window cleaning is a " building operation " within the definition in s. 151, and therefore, by s. 107, is outside the scope of s. 26.

[*Groves* v. *Lord Wimborne* (2), *Cox* v. *Cutler & Sons and Hampton Gas Co.* (3) referred to.]

Cur. adv. vult.

Feb. 22. TUCKER L.J. The learned judge below appears to have rejected the plaintiff's evidence that the roof gave way under him while he was walking along the

(1) [1947] K. B. 918, 927.

(2) [1898] 2 Q. B. 402.

(3) [1948] 2 All E. R. 665.

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ladder, and to have accepted the theory of the defendants' expert that the probability was that he had slipped whilst walking along the ladder and put his foot through one of the asbestos sheets. He held that the defendants were not liable at common law as there was no failure on their part to prevent damage to the plaintiff from unusual danger, of which they knew or ought to have known, he taking reasonable care for his own safety, but he found that they were in breach of their statutory duty under s. 26 of the Factories Act, 1937, " so far as is reasonably practicable to provide and maintain safe " means of access to every place at which any person has at any " time to work." He said it was not reasonably practicable to expect the defendants to reconstruct their roof, but they could have ensured safe access by the provision of more planks or ladders. It is, I think, clear from the judgment as a whole that he took the view that it was this absence of sufficient planking that made the roof, as a means of access, unsafe, and was the cause of the accident. Having thus found the defendants in breach of their statutory duty, he went on to deal with the allegations of contributory negligence made against the plaintiff in these words: " The next question, however, is: " how far is Mr. Lavender responsible? He was not a servant " of the defendants. He was an independent contractor " working on his own account. The duty of an employer to a " servant is much higher than that of an occupier to a window " cleaner. The employer owes a duty to his servant to use " reasonable care in laying out the work to see that it is safe, " and he has a duty to use reasonable care to provide proper " plant and appliances for his servants. No such duty rests on " the occupier of premises who employs a window cleaner as an " independent contractor to clean his windows. In such a case " it is the duty of the window cleaner to provide his own plant " and appliances and to lay out the work himself so that it is " reasonably safe. It is common knowledge that window " cleaners do bring their own plant and appliances and do lay " out the work themselves. No occupier ever dreams of taking " on himself the responsibility of telling the window cleaner how " to do the work or what plant or appliances he should use. " So here, although this was a factory, it seems to me that it " was Mr. Lavender's responsibility to lay out the work properly " and to provide proper plant and appliances, or, in other words, " to see that there were safe means of access to the windows. " That responsibility of window cleaners is well known, and "insurances are regularly taken out by them on account of it. "In this case, therefore, as between the defendants and "Mr. Lavender, it was Mr. Lavender, and not the defendants, "who was responsible for seeing that there were safe means of "access. That is borne out by the evidence." Later he says: "In my judgment, therefore, although there was a breach of "duty by the defendants of s. 26 of the Factories Act, there was "also a breach of duty by Mr. Lavender in failing so to lay "out the work, and to provide such plant and appliances, that "there would be safe means of access to the windows. Having "regard to the special responsibility of care and skill which is "required of a window cleaner, I hold that he was guilty of "negligence, and, indeed, of negligence which was the decisive "cause of the accident. If he had provided safe means of "access, if he had provided more planks, or even if he had "walked along this ladder more carefully and had not slipped, "there would have been no accident at all."

With respect to the learned judge I can find nothing in the evidence to support his view that the plaintiff's failure to provide the planking that might have obviated the accident, or the fact that he slipped, constituted negligence on his part. There was no evidence that he had expressly agreed to provide planking, nor was there any evidence that it is the custom for window cleaners to bring with them any appliances necessary to render safe any part of the premises on which they have to go in order to clean windows. Nor was there evidence that planking of the kind required is included in the "tackle" which a window cleaner is no doubt required to provide. But, whatever the contractual duty may have been, nothing short of negligence in the performance of this duty will, in my view, suffice to relieve the occupier of the factory from the consequences of a breach of his statutory duty under s. 26 at the suit of the injured person for whose benefit the duty is imposed. Where a servant of the independent contractor is injured as a result of the failure of the contractor to provide the necessary plant, it is no doubt true that the occupier in breach of his statutory duty may be able to recover over from the contractor any damages he has to pay to the injured servant, or in an action in which both the contractor and the occupier are made defendants the contractor may be ordered to pay the whole or some part of the damages. This was the case in *Whitby* v. *Burt, Boulton & Hayward, Ld.* (1); but to apply

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(1) [1947] K. B. 918.

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this principle to a case where the injured workman is himself the contractor, and where no negligence is proved against him, would in effect be to allow the occupier of a factory to contract out of the statute. Assuming a contractual obligation on the part of the plaintiff to provide the necessary "tackle," and assuming that this includes planking where required, I do not think on the facts of this case that his failure to provide it amounted to negligence, and it was not suggested that he was not properly using the appliances which were available. For these reasons I am of opinion that the finding of negligence against the plaintiff on the evidence given in this particular case cannot stand, and it is therefore unnecessary to consider whether negligence of the kind found by the learned judge would, since the passing of the Law Reform (Contributory Negligence) Act, 1945, necessarily altogether preclude him from recovering any damages.

It was contended for the defendants that even if the learned judge was in error with regard to the plaintiff's negligence, none the less his judgment should stand on the ground that the evidence disclosed no breach of statutory duty on their part. A number of points were taken. (1.) It was argued that the occupier of a factory owes no duty under s. 26 to an independent contractor or his servants working on the factory premises. In short, that the duty owed is confined to the employees of the occupier. It is true that there appear to be only two reported cases in which an independent contractor or his workmen have brought actions against factory occupiers under the safety provisions of this statute or the corresponding sections in earlier Acts. It is significant that in the first of these cases this point was never taken by the defence, whilst in the second it is open to some doubt whether it was raised precisely in this form; if so, it was inferentially rejected. The first of these cases is *Fowler* v. *Yorkshire Electric Power Co., Ld.* (1) which is a decision of Lawrence J. (as he then was) in favour of a servant of an independent contractor where, in the judge's view, the real blame for the accident rested upon the independent contractor, who was not a party to the action. The second is a previous decision of Denning J. in *Whitby's* case (2). A study of ss. 12 to 40, which form Part II. of the Act of 1937, satisfies me that this part of the Act has not the limited application contended for by the defendants, but it is sufficient for present purposes to confine my decision to s. 26, the language of which is, I think, clearly designed to include in its protection persons working in a factory whether or not they are directly employed by the occupier.

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(1) [1939] All E. R. 407.

(2) [1947] K. B. 918.

In the second place it was contended that the work in question was a "building operation" within the definition contained in s. 152, and, therefore, by s. 107 outside the scope of s. 26. The definition is as follows: "'Building operation' "means the construction, structural alteration, repair or "maintenance of a building (including re-pointing, re-"decoration and external cleaning of the structure)"—then there are some other words which are not material—"but does "not include any operation which is a work of engineering "construction within the meaning of this Act." In my view these words are not apt to include window cleaning, which is an operation quite distinct from the well-known processes for the external cleansing of structures. Section 26, accordingly, applies to this operation. I should desire to reserve for future consideration whether or not s. 26 applies to building operations carried on in a factory, as held by Denning J. in *Whitby's* case (1).

Thirdly, it was argued that the obligation under s. 26 to provide safe means of access is confined to places inside the factory building and does not extend to work on the outside unconnected with the operations of the factory. This argument is, I think, clearly wrong. A factory, for the purposes of the Act, by s. 151 includes any premises in which or within the close or curtilage or precincts of which persons are employed, and safe access must be provided to all places within the curtilage or precincts where any person has to work.

Finally, it was submitted that this roof was not a place where the plaintiff "had to work." It was said he was not required to work in any particular place, it was for him to decide where and how he would work. The answer to this is that he had to work at the windows and the duty of the defendants under s. 26 was to provide safe means of access, so far as reasonably practicable, to these windows. The roof and one plank were the only means of access provided, and these have been found to be unsafe. For these reasons, I am unable to accept any of the contentions advanced on behalf of the defendants in support of the submission that the evidence disclosed no breach of their statutory duty under s. 26, and on this part of the case I agree with the trial judge.

(1) [1947] K. B. 918.

For the reasons stated earlier in this judgment, however, I am of opinion that this appeal succeeds, and that the plaintiff is entitled to judgment. As to damages, the learned judge provisionally assessed the sum at 400*l*. It was contended on behalf of the plaintiff that this sum is inadequate having regard to the evidence. It is sufficient to say that on a review of the evidence I see no reason for not accepting the judge's estimate.

I would accordingly allow this appeal and enter judgment for the plaintiff for the sum of 400*l*.

SINGLETON L.J. This appeal, like several others which have been before the court recently, illustrates the far-reaching effects of the Factories Act, 1937.

[His Lordship then stated the facts and having intimated that he was satisfied Denning J. was right to reject the plaintiff's claim for breach of common law duty, continued :] The questions for the consideration of this court arise under s. 26 of the Act of 1937, sub-s. 1 of which reads as follows: "There shall, so far as is reasonably practicable, be provided "and maintained safe means of access to every place at "which any person has at any time to work." The first question is whether the plaintiff was a person entitled to the benefit of this section, or rather a person entitled to recover against the occupiers of the factory if he sustained injuries through a breach by them of their duty under it. At one stage of the argument I felt considerable doubt on this, but I have arrived at the conclusion that the submission made on behalf of the plaintiff is right. Speaking generally, the earlier Factory Acts were designed for the protection of those employed in the factory, that is, employed by the occupiers. There has been a wide extension in this regard as is shown by later Acts, and particularly by an examination of the different safety provisions in Part II of the Act of 1937. Section 26, sub-s. 1 deals with access to every place at which any person has at any time to work, and sub-s. 2 (under which also the claim was laid) begins with the words "Where any person "is to work." In order to fulfil his contract with the defendants the plaintiff was a person who had to work at the place at which he met with his injuries, and, accordingly, he would appear to be within the provisions of the section. I think he would have been if he had been working inside the factory, and I cannot see that the case is altered by reason of the fact that he was working outside in order to clean the windows of the factory which could not be opened. This was the view of Denning J., and it is in accordance with his decision in *Whitby* v. *Burt, Boulton & Co.* (1); it also accords with the judgment of Lawrence J. (as he then was) in *Fowler* v. *Yorkshire Electric Power Co., Ld.* (2), though it is right to point out that no such question was raised in that case.

The next question is: was it established that the defendants were in breach of their duty under s. 26, sub-s. 1? Their duty was so far as was reasonably practicable to provide and maintain safe means of access to every place at which the plaintiff had to work. The plaintiff had to clean windows some height above ground, and it might be argued that access to those windows is by means of a ladder, but I do not read the section as meaning that it is the duty of the occupiers of the factory to provide a window cleaner with his plant or tackle. The section should be read as imposing upon the occupiers the duty, as far as is reasonably practicable, of providing him with a safe way to the place at which he has to work with the ordinary plant or tackle which a window cleaner has, including a safe place on which to put his ladder. On the evidence given the normal way of getting to these windows was by the roof of the lean-to: that was the way used by the man who had cleaned the windows before the plaintiff undertook the work, and on the roof was the plank which he had used: there is nothing to show whether or not it was provided by the defendants. This plank was only 6 feet long, and the length of roof to be traversed by the window cleaner was about 60 feet. So far as was shown it was not possible to get a ladder from the ground to the windows. If this is right, and I think it is, there was no other means of access to the windows in question except by this roof, and the roof was not constructed to carry the weight of man unless there were planks, or the like, to distribute the weight.

On these facts it seems to me that it is established that the occupiers did not provide or maintain a safe means of access to the place at which the plaintiff had to work. And there was no evidence given on which they can claim any help from the words "so far as is reasonably practicable." Whether the accident happened in the way that the plaintiff described, or in the way the judge thought more probable, the plaintiff's injuries were caused by the absence of a safe way along the

(1) [1947] K. B. 918.

(2) [1939] 1 All E. R. 407.

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roof. I do not think it necessary to express any opinion whether the result would have been the same if it had been proved that in such cases it was usual for the window cleaner to take with him all planks, etc., to provide a way across a roof such as this. I emphasize that there was no such evidence, and I repeat that the case concerns a factory, and the duty created by statute in relation to persons who have to work in factories.

The remaining question is as to contributory negligence (para. 6 of the defence). Denning J., having found that there was a breach of duty by the defendants, came to the conclusion that as between them and the plaintiff he, the plaintiff, was the man to provide more planks if they were needed, and that, as between the parties, the responsibility rested wholly on the window cleaner. I cannot agree with this view. The learned judge found that the defendants had broken their statutory duty: the evidence did not establish that it was the duty of window cleaners to take all planks necessary to make a roof safe, nor that it was the custom for them to do so. Nor was it proved that the defendants contracted on any such basis. The judge added " If he had provided safe means of access, " if he had provided more planks, or even if he had walked along " this ladder more carefully and had not slipped, there would " have been no accident at all." Having considered the terms of the Law Reform (Contributory Negligence) Act, 1945, Denning J. arrived at the conclusion that the plaintiff's responsibility for the damage was the whole share and he gave judgment for the defendants. I find myself unable to agree with this, in view of the fact that the judge had found the defendants to have failed in their statutory duty in a way which must at least have had some bearing on the accident to the plaintiff. And, again, there was nothing to show that the plaintiff did not walk along the ladder carefully; and a slip, if he did slip, is not of itself proof of negligence. It was for the defendants to show that the plaintiff was negligent in a way which caused, or which contributed to, the accident, and, in my view, they did not do so. The only evidence they called was that of an expert witness, a surveyor, and his evidence was directed to show that the accident could not have happened in the way the plaintiff said it did. The witness had not inspected the roof until July, 1947, long after it had been repaired.

I would allow the appeal and order that judgment be entered for the plaintiff in the action for 400*l.* damages, the amount provisionally estimated by the trial judge.

BIRKETT J. In this appeal the questions for determination arose out of the circumstances in which the plaintiff, Mr. Lavender, was injured when working on the premises of the defendants, Messrs. Diamints, Ld., in the month of November, 1946. The learned judge below held that the defendants were not liable at common law because there had been no failure to perform their common law duties, but he found that the defendants were in breach of their statutory duties under s. 26 of the Factories Act, 1937. This section laid upon the defendants the duty of providing and maintaining, so far as is reasonably practicable, safe means of access to every place at which any person has at any time to work.

It was submitted on behalf of the defendants that the plaintiff could not take advantage of the provisions of the section because he was not a servant of the defendants, and the defendants owed no duty to him in the circumstances of this case. An examination of the precise wording of the section shows that the duty is laid in very wide terms. The safe means of access referred to in the section is to "every "place at which any person has at any time to work." I cannot think that it makes the slightest difference whether the place is inside or outside the factory. It is "every place." Neither do I think that "any person" is confined to employees of the defendants and excludes a person like the plaintiff, employed to clean the windows. The words "has at any time to work" must be read in their ordinary meaning; and, in my view, the plaintiff on the day when he met with his accident was within the terms of the section, and if it be shown that the injuries he sustained arose from a breach of their statutory duty on the part of the defendants he was entitled to damages. What was the duty of the defendants in the circumstances of this case? The evidence showed that the only means of access to the windows in question was by way of the asbestos roof; the evidence also showed that the roof, as such, was not a safe means of access, because of its construction, but also because of the nature of an asbestos roofing. It could only be made a safe means of access if planks or similar things were supplied to overcome the unsafe nature of the roof, considered by itself. Denning J. seems to have taken the view that the element of danger was the absence of sufficient or adequate planking to overcome the inherent inadequacy of the roof itself. It seems to me reasonably plain that if the plaintiff was to clean the windows in question he had to use this roof, and was therefore

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in a place where he had to work. The duty of the defendants was to provide and maintain, so far as was reasonably practicable, safe means of access to that place; and that safe means of access depended upon the provision of adequate planking. This they clearly failed to do. But the learned judge then went on to say that the duty of providing the necessary planking to make the means of access safe rested on the plaintiff. There was no evidence before the learned judge to show that it was a usual thing for window cleaners in similar circumstances to provide planking, nor that anything was said about it when the plaintiff undertook to clean these particular windows. There was no evidence to show that the window cleaner was under any duty other than to provide the usual and ordinary equipment for his job. In my judgment, the duty of providing and maintaining safe access was on the defendants and they were clearly in breach of that duty.

In that state of affairs I cannot think that the plaintiff should be held to be guilty of negligence because he did not provide the planking; nor do I think that there was any evidence to show that if he slipped from the ladder on which he was walking when he met with his accident that that was a negligent thing to do. The learned judge has held that despite the breach of statutory duty on the part of the defendants the whole of the responsibility rests on the plaintiff. With this view I am unable to agree, and, in my opinion, the plaintiff is entitled to succeed. The sum of 400*l.* was assessed by the learned judge; and I think the appeal must be allowed, and judgment entered for the plaintiff for 400*l.*

Appeal allowed.
Leave to appeal to House of Lords on terms.

Solicitors for plaintiff: *Hepburns.*
Solicitors for defendants: *L. Bingham & Co.*

A. W. G.

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SAME *v.* DIAMOND.

SAME *v.* WHITE.

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Jan. 14.

Lord Goddard C.J. and Humphreys J.

Local government—Metropolis—Street trading—Licences—Revocation by council for misconduct—Licensees " in their opinion unsuitable to " hold " them—Appeals—Jurisdiction of appellate tribunal—London County Council (General Powers) Act, 1947 (10 & 11 *Geo.* 6, *c.* xvi), *s.* 21, *sub-s.* 3 (*a*) ; *s.* 25, *sub-s.* 1.

By s. 21, sub-s. 3, of the London County Council (General Powers) Act, 1947, a borough council may revoke a licence granted by it to a street trader if " (*a*) the . . . . licensee is on account of " misconduct or for any other sufficient reason in their opinion " unsuitable to hold such licence . . . ." Section 25, sub-s. 1, provides that any person aggrieved (inter alia) by the revocation by a borough council of a licence may appeal to a petty sessional court and that " on any such appeal the court may confirm, " reverse or vary the decision of the borough council . . . ."

Held, that s. 25, sub-s. 1, gives a street trader an unrestricted right to appeal against a decision under s. 21, sub-s. 3 (*a*) ; that once he appeals, the petty sessional court is bound to form an opinion of its own as to the suitability of the trader to hold a licence ; and that the petty sessional court is entitled to substitute its opinion for that of the council.

CASE STATED by a metropolitan magistrate.

Three street traders, who had been granted licences by the appellant borough council under s. 21 of the London County Council (General Powers) Act, 1947 (1), were convicted of selling goods at prices exceeding the maximum fixed by the relevant order made under the Defence (General) Regulations, 1939. The council accordingly revoked their licences under sub-s. 3 (*a*) of s. 21 of the Act of 1947, being of the opinion that by reason of their convictions, they were unsuitable to hold their licences.

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(1) London County Council (General Powers) Act, 1947, s. 21, sub-s. 1 : " A person requiring an " annual licence or the renewal of " an annual licence shall make " application in writing to the " borough council . . . . Sub-s. 2. " As soon as reasonably practicable after the receipt of an " application under this section " the borough council shall . . . . " grant or renew an annual licence " to the applicant. Sub-s. 3. " A borough council may refuse to " grant or renew an annual licence " or may at any time revoke or " vary an annual licence granted " by them if—(*a*) the applicant or " licensee is on account of misconduct or for any other sufficient reason in their opinion " unsuitable to hold such licence ; " or (*b*) the space available in the " street or streets to which the " application relates or which is or " are prescribed by the licence is " at the date of such application " or becomes at any time after the " grant of such licence insufficient " to permit of the applicant or " licensee engaging therein in any " street trading or in the particular street trading proposed " to be or actually carried on by

The three traders appealed from those decisions under s. 25, sub-s. 1, of the Act to a magistrate. The council contended, on the hearing of those appeals, (i.) that the magistrate was not entitled to substitute his opinion as to the suitability of the traders to hold licences for that of the council; (ii.) that he was not empowered to review at large the merits of the matter for the purpose of deciding whether each of the traders was suitable or not; and (iii.) that his jurisdiction was limited to considering whether or not there was any material on

"him without causing undue "interference with or inconvenience to traffic in such street "or streets; or (*c*) the street or "streets to which the application "relates is or are not a designated "street or designated streets; or "(*d*) the street or streets to which "the application relates is or are "a designated street or designated "streets in relation to which the "borough council have by resolution specified a class or classes "of articles or things which or "other than which they will not "prescribe in any street trading "licences granted by them in "respect of that street or those "streets . . . . ; or (*e*) the applicant or licensee has persistently "refused or neglected to pay any "charges due from him to the "borough council under this Part "of this Act or the byelaws made "thereunder; or (*f*) the licensee "has for a period of not less than "four weeks not exercised or not "fully exercised his rights under "the licence . . . ."

Section 25, sub-s. 1: "Any "person aggrieved by the refusal "of a borough council to register "him as a registered street trader "or to grant or renew an annual "licence or by the cancellation by "a borough council of his registration as a registered street "trader or by the revocation or "variation by a borough council "of an annual licence or by any "prescription made by a borough "council under subsection (5) of "section 21 (Annual licences) of "this Act may appeal to a petty "sessional court and on any such "appeal the court may confirm, "reverse or vary the decision of "the borough council and may "award costs. Provided that— "(ii) no appeal shall be brought "under this section against the "refusal of a borough council to "grant or renew an annual licence "on the ground mentioned in "para. (*c*) or the ground mentioned in para. (*d*) of subsection "(3) of the said section 21 . . . ."

Section 64: "Any person deeming himself aggrieved by any "conviction or order by a court of "summary jurisdiction under any "provision of this Act may appeal "to the next practicable court of "quarter sessions under and "according to the provisions of "the Summary Jurisdiction Acts."

which the council could reasonably have arrived at their decisions to revoke the licences.

The magistrate, being of the opinion that the traders were, in fact, still suitable to hold the licences and holding that he was empowered, and bound, to consider the whole merits of the matter de novo in the case of each trader and that his jurisdiction was not limited as contended by the council, allowed the appeals, but at the request of the council stated the question for the opinion of the court whether he came to a correct determination in each case as to the extent of his powers on the hearing of an appeal against a decision of á borough council under s. 21, sub-s. 3 (*a*), of the Act of 1947.

Havers K.C. and *Sebag Shaw* for the borough council. The magistrate was not entitled to substitute his opinion for that of the council. The words "in their opinion" must have been inserted in para. (*a*) of sub-s. 3 of s. 21 of the London County Council (General Powers) Act, 1947, for some purpose. They do not appear in para. (*b*) or in any of the other paragraphs of sub-s. 3. The only appeal which can be made to a magistrate under s. 25, sub-s. 1, is on the question whether there was any evidence on which the council could form their opinion.

[HUMPHREYS J. But that is a question of law.]

Yes.

[HUMPHREYS J. It is very odd to give a magistrate power to hear an appeal on a question of law.]

Fulham Borough Council v. *Santilli* (1) is distinguishable from the present case. That was a case on s. 31, sub-s. 2, of the London County Council (General Powers) Act, 1927, which corresponds to s. 21, sub-s. 3, of the Act of 1947. Paragraph (*a*) of sub-s. 2 of s. 31 of the Act of 1927 also contained the words "in their opinion." But the appeal in *Santilli's* case (1) was against a decision under para. (*c*) of that subsection, which did not contain those words. The effect of those words in para. (*a*) was never considered in *Santilli's* case (1).

[LORD GODDARD C.J. If you are right the right of appeal under s. 25, sub-s. 1, of the Act of 1947 is illusory, because whether a trader is unsuitable to hold a licence is always a matter of opinion for the borough council.]

The right of appeal is not quite illusory. It is still a matter of law whether there were facts on which the council could form such an opinion, and the trader may appeal on that question.

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(1) [1933] 2 K. B. 357.

[LORD GODDARD C.J. Section 25, sub-s. 1, gives an unrestricted right of appeal in plain terms.]

Section 25, sub-s. 1, only gives, prima facie, an unlimited right of appeal. I concede that did the words "in their "opinion" not appear in s. 21, sub-s.3 (*a*) I could not argue this case at all. But, if I am wrong, those words are surplusage, and the court should interpret them in such a way as to give them some meaning.

Lester and *Ahern* for the street traders.

LORD GODDARD C.J. It is said that, on an appeal under s. 25, sub-s. 1, of the London County Council (General Powers) Act, 1947, against the revocation of a licence under s. 21, sub-s. 3 (*a*), of that Act on account of misconduct or for any other sufficient reason rendering the licensee unsuitable to hold such licence, the magistrate is not entitled to substitute his opinion for the opinion of the borough council; that all he can decide is whether there was evidence upon which the council could come to that conclusion. I find myself quite unable to accept that argument. If that argument be right, the right of appeal, which is given by s. 25 against the revocation of a licence on any ground mentioned in s. 21, sub-s. 3 (*a*) would be purely illusory. Such an appeal would, as Humphreys J. pointed out in the argument, really be only an appeal on the question of law whether there was any evidence upon which the borough council could have formed an opinion. If their decision were a mere matter of opinion and that opinion were to be conclusive, I do not know that the borough council would be obliged to have any evidence. They could simply say: "In our opinion this person is unsuitable to "hold a licence." It is true that they must give a sufficient reason, but they could give any reason they liked and say: "That is sufficient in our opinion." I do not know how a court could then say on appeal that that was not a sufficient reason. If the reason need only be one which is sufficient in the opinion of the borough council, it is difficult to see how any court of appeal could set aside their decision. It seems to me that s. 25, sub-s. 1, gives an unrestricted right of appeal, and if there is an unrestricted right of appeal, it is for the court of appeal to substitute its opinion for the opinion of the borough council. That does not mean to say that the

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court of appeal, in this case the metropolitan magistrate, ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter, and it ought not lightly, of course, to reverse their opinion. It is constantly said (although I am not sure that it is always sufficiently remembered) that the function of a court of appeal is to exercise its powers when it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right. The words of s. 25, sub-s. 1, are very wide. The magistrate is given power to " confirm, reverse or vary the decision of the " borough council," and, that being so, it seems to me that once the licensee appeals to him, he is bound to form an opinion upon the matter and " confirm, reverse or vary the " decision of the borough council " according to the judgment which he forms.

I should add that my opinion in the present case is fortified by *Fulham Borough Council* v. *Santilli* (1). It is true that the particular paragraph of s. 31, sub-s. 2 of the London County Council (General Powers) Act, 1927, which corresponds to s. 21, sub-s. 3 of the Act of 1947, which came in question there was not para. (*a*), but at the same time that decision has stood for fourteen years. The Act of 1927 has been modified to some extent by the Act of 1947, because in the latter Act a provision was inserted (s. 25, sub-s. 1, proviso (ii.)) which takes away that right of appeal which was in question in *Santilli's* case ; in other words, if *Santilli's* case had occurred this year, the trader would not have had a right of appeal to the magistrate at all. That shows that the matter now in issue was before Parliament at the time when the Act of 1947 was passed. Parliament has recognized that in certain matters the opinion of the borough council is to be final. If Parliament had intended that the very wide right of appeal which is prima facie given by s. 25, sub-s. 1 should be limited in the way in which it is now contended it ought to be limited, I cannot myself see that there would be any doubt but that they would have inserted express words into the section limiting that right.

It is perhaps not without some importance to notice that a further right of appeal to quarter sessions is given to a trader by s. 64 of the Act of 1947, and it seems therefore that Parliament in fact attaches great importance to the right of a trader, whose livelihood may be taken away by the action of the borough council, to have not only one appeal but two appeals.

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(1) [1933] 2 K. B. 357.

For the reasons which I have expressed I have come to the conclusion that the magistrate had power to act as he did. Whether we would have agreed with the magistrate or not is not for us to say, but that he had power to act as he did we think is beyond question. I think that the magistrate came to a right conclusion in holding that he had jurisdiction to entertain the appeal on any ground which seemed right to him, and that we, therefore, cannot interfere with or reverse his decision.

HUMPHREYS J. I am of the same opinion. I only desire to add a few words of my own. I think considerable weight must be given to the fact that the argument of Mr. Havers, if accepted, would result in our deciding that the only appeal to a petty sessional court given by s. 25, sub-s. 1, of the Act of 1947, from a decision of a borough council under s. 21, sub-s. 3 (*a*), was an appeal on a question of law. Not only is there nothing in s. 25 itself to indicate that such is the intention of Parliament, but it seems to me that that construction would be quite contrary to the language of the section. I see no reason to withdraw or to differ from what I said in this court in *Fulham Borough Council* v. *Santilli* (1), namely, that, "It is a matter of common knowledge and entirely beyond "doubt in an ordinary case that a right of appeal is a right "to a rehearing of the whole matter in dispute, the appellate "tribunal not being confined to the particular reasons which "have been given by the court below as the ground of their "decision." I think the fact that, by s. 25, sub-s. 1, "on any "such appeal the court may confirm, reverse or vary the "decision of the borough council" indicates as strongly as possible that the appellate court has the fullest power to deal with the appeal from every point of view. Why should it be given a power to vary the decision if the only matter before it is to be a question of law, namely, whether there was any evidence upon which another court could have come to the conclusion at which it had in fact arrived? I think the words in s. 21, sub-s. 3 (*a*) "on account of misconduct or "for any other sufficient reason in their opinion" are not strong enough to take away the general right of appeal which

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(1) [1933] 2 K. B. 357, 367.

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is given to a person who has been refused under that section what is, in effect, the right to earn his living in the way in which he has been accustomed to do. I do not think that those words are strong enough to take away that right of appeal and to require us to hold, as we should be bound to hold if we accepted Mr. Havers' argument, that the only right given by s. 25, sub-s. 1, to appeal to a magistrate from a decision under s. 21, sub-s. 3 (*a*) is the right to appeal on a question of law. Further, there is the odd fact, as Lord Goddard has pointed out, that by s. 64 there is a further right of appeal. Why should there be a right of appeal to quarter sessions from the magistrate on a pure question of law? That is quite contrary to the ordinary rule. Where an Act gives a right of appeal to a tribunal such as a magistrate or quarter sessions on questions of fact, it is quite common to find that it also gives a right of appeal by case stated on questions of law alone to the High Court, as in the present case, but not to a lower court. I feel no doubt that the decision of the magistrate was one to which he had power to come.

Appeal dismissed.

Solicitor for council: *Town Clerk, Stepney.*

Solicitors for street traders: *Harry Baker; Conway & Conway; Scott & Son.*

R. P. C.

Reversed. H.L. [1950] 1 All E.R. 834.

Referred to. HUTCHINSON *v.* JAUNCEY [1950] 1 K. B. 574

Reversed. BAKER *v.* TURNER [1950] A. C. 401

Referred to. JONAS *v.* ROSENBERG [1950] 2 K. B. 52

TURNER *v.* BAKER.

C. A.

1949
Feb. 14, 15, 16, 17, 18.

Lord Merriman P., Asquith L.J. and Vaisey J.

Landlord and tenant—Rent restriction—Tenancy of whole house—One room sub-let on furnished tenancy with joint use of another room—Recovery of possession by superior landlord—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), s. 12, *sub-s.* 2, *proviso* (1.)—*Applicability of Act.*

The plaintiff was the owner of a dwelling-house at Old Coulsdon, Surrey. He let the house to the defendant's husband on a weekly tenancy at 26*s.* 1*d.* In January, 1948, the defendant, his widow succeeded to that tenancy, and in following month sub-let a furnished bed-sitting room with use of kitchen at 35*s*. per week :

Held (1.), that there was a sharing of the house, and that a house, part of which at the material time was the subject matter of a sharing agreement between tenant and sub-tenant, was not a house let as a separate dwelling, and, therefore, was outside the protection of the Rent Restriction Acts ; (2.) that it was immaterial whether or not the landlord was a party to or privy to the sharing agreement, or whether that agreement was solely a matter between the tenant and sub-tenant.

APPEAL from Croydon county court.

The plaintiff was the owner of a dwelling-house at Old Coulsdon, Surrey. He let the house to the defendant's husband on a weekly tenancy at 26*s*. 1*d*. per week. In January, 1948, the defendant, his widow, succeeded to that tenancy. The following month she (the defendant) sub-let a furnished bed-sitting room with use of kitchen at 35*s*. per week. The plaintiff gave notice to the defendant to quit and subsequently brought an action in the county court to recover possession of the dwelling-house, or alternatively possession of the front room which the defendant had sub-let on a furnished tenancy, alleging that the defendant was no longer entitled to the protection of the Rent Restriction Acts, either in respect of the part of the premises sub-let furnished or in respect of any part of the house, because the defendant was sharing a living room (the kitchen) with the sub-tenant. The county court judge held that the defendant allowed a sharing with herself of the dwelling-house and therefore lost the protection of the Rent Restriction Acts in respect of the whole house. He gave judgment accordingly for the plaintiff. The defendant appealed.

Caulfield for the defendant. If as between landlord and tenant there is an agreement for a share in the letting, that does not create a dwelling-house within the meaning of the Acts, in favour of the tenant who is sharing and it is immaterial whether the agreed sharing is between landlord and tenant. or tenant and sub-tenant, provided always the landlord is a party to the sharing agreement. If subsequently to the tenancy agreement, the tenant unilaterally as between himself and the superior landlord, creates by a " sub-tenancy " of part of the premises, a sharing agreement of part of the premises between himself and a "sub-tenant," such sharing agreement enables the tenant to say that the premises enjoyed by the sub-tenant are not a dwelling-house and therefore permits the tenant to recover possession from the sub-tenant. This does not confer such a right on the superior landlord against either the tenant or sub-tenant. Should the tenant create a sub-tenancy of a furnished tenement, then if the whole sub-tenement, is in the exclusive possession of the sub-tenant, and is a dwelling house, the superior landlord can, under s. 12, sub-s. 2, read together with proviso (I.) to that section, recover that part of the premises, but should the sub-tenement be furnished and shared, though the tenant would be entitled to recover from the sub-tenant, the landlord would have no such right against either tenant or sub-tenant, because proviso (I.) did not operate apart from s. 12, sub-s. 2, and the tenement by reason of the sharing agreement was not a dwelling house let at a rent which included payment in respect of the use of furniture. He referred to *Llewellyn* v. *Hinson* (1); *Neale* v. *Del Soto* (2); *Cole* v. *Harris* (3); *Kenyon* v. *Walker*; *Stevenson* v. *Kenyon* (4); *Barrell* v. *Fordree* (5).

Michael Hoare for the plaintiff. The question whether the Rent Acts apply to a house is to be determined by the status of the house at the time when the landlord seeks to obtain possession, and not by the relationship of the parties to the litigation before the court. The status of the house may be altered so as to take it out of the protection of the Act, by something which the tenant has done and to which the landlord was not a party. Sharing affects the status of the house, i.e., the fact that the house is not being used as a separate dwelling has such affect. A tenant who has sub-let a part of the premises furnished is not entitled to the protection of the Act in regard to that part, if the sub-letting be still subsisting when the action is brought. *Kenyon* v. *Walker*; *Stevenson* v. *Kenyon* (4) is no authority against any of these contentions. The landlord in that case did not take the point that the sharing created by the tenant affected the status of the house and so deprived the tenant of the protection of the Acts vis-à-vis the landlord. He referred to *Prout* v.

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(1) [1948] 2 K. B. 385.

(2) [1945] K. B. 144.

(3) [1945] K. B. 474.

(4) [1946] W. N. 203; [1946] 2 All E. R. 595.

(5) [1932] A. C. 676.

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Hunter and Another (1); *Phillips* v. *Halloran* (2); *Leslie & Co. Ld.* v. *Cumming and Others* (3); *Haskins* v. *Lewis* (4).

LORD MERRIMAN P. This is a tenant's appeal from a judgment for possession, in two months, of certain premises at 22, Inwood Avenue, Old Coulsdon, Surrey, given by His Honour Judge Sir Gerald Hurst sitting in the Croydon county court.

The first question with regard to possession is: What was the status of the premises—I am designedly using a neutral word—or the relevant part of the premises when the landlord sued for possession on June 15, 1948? *Prout* v. *Hunter and Another* (1) is the authority for that proposition. In that case the landlord had let to a tenant an unfurnished house. The tenant had let it furnished to a sub-tenant and in relation to the questions thereby raised, Bankes L.J. said "The tenant, without going into occupation of it herself, "furnished the flat, and sub-let it at a rent which included "payment for the use of the furniture. The landlord, having "given the tenant notice to quit, contends that inasmuch as "the flat was, at the time when he gave notice to quit and "at the time when that notice expired, let as a furnished "flat, the Act did not apply, and that he is therefore entitled "to recover possession on the expiry of the notice. The tenant, "on the other hand, contends that a house which is once "within the Act is always within the Act, and that as it "applied at the time of letting to her it has not ceased to "apply, and the landlord is consequently not entitled to "possession." He then referred to s. 12, sub-s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the first proviso to which I had better read. That proviso refers to this question of a furnished house (i.) "this Act shall not, "save as otherwise expressly provided, apply to a dwelling "house bona fide let at a rent which includes payments in "respect of," inter alia, the use of furniture. As regards post-1939 tenancies, substantially the same words are enacted in s. 3, sub-s. 2 (b) of the Rent and Mortgage Interest Restrictions Act, 1939. Bankes L.J. said: "It is argued "that in s. 12, sub-s. 2, the statute is dealing with the status "of the house rather than with the rights of the particular "party to the litigation. The Act is not to apply to a

(1) [1924] 2 K. B. 736.
(2) [1925] 1 K. B. 756.
(3) [1926] 2 K. B. 417.
(4) [1931] 2 K. B. 1.

" dwelling-house which is let furnished. But at what time " is its status of a furnished house to be considered ? It would " seem that the material time is when the landlord seeks to " obtain permission. If at that time the status of the house " is that of a house let as a furnished house it is immaterial " that at some earlier date its status was that of an unfurnished " house. In my opinion that is the true construction to put " upon this difficult statute for the purpose of determining " this particular question." There was no dissent from that point of view in the other judgments and there is other authority to the same effect. On the question of the status of the premises on June 15, 1948, the material facts are as follows : Before February 14, 1948, the plaintiff let the premises, meaning in this connexion the whole house, to the defendant's husband on a weekly tenancy. On January 6, 1948, the defendant, his widow, succeeded to that tenancy which admittedly brought the house within the definition of a " dwelling-house " as defined by s. 16, sub-s. 1 of the Rent Restriction Act, 1933, as follows : " Dwelling-house has the " same meaning as in the principal Acts, that is to say, a " house let as a separate dwelling or a part of a house being " so let." In spite of the apparent generality of s. 7, sub-s. 1 of the Rent Restriction Act, 1938, which provides that " If any question arises in any proceedings whether the " principal Acts apply to a dwelling-house, it shall be deemed " to be a dwelling-house to which those Acts apply unless " the contrary is shown," it is settled by authority, binding on this court, that that presumption arises only where it is first established that the premises are a " dwelling-house " as defined. The onus of establishing this is on the tenant who asserts that there is some restriction on possession or who claims the protection of the Rent Acts. *Wright and Another* v. *Arnold* (1) is the authority for that. Referring to s. 7, sub-s. 1, which I have just read, Morton L.J. said : " I do not think " that the sub-section has such a far-reaching effect as " that "—namely, to throw the whole onus of proving that the thing was not a " dwelling-house " on the landlord. But he goes on " It seems to me that it can only apply where it " is first established that the premises as to which the question " arises are a dwelling-house." That, I think, means a " dwelling house within the definition contained in the Act." Secondly on February 14, 1948, the tenant sub-let (I am

(1) [1947] K. B. 280.

quoting from the rent book) a "furnished bed-sitting room, "use of kitchen," at a rent of 35*s.* per week. I would call attention to some points in connexion with the rent book, which was handed to the sub-tenant. I do so in view of what may seem to be the impossible argument that there was here no letting at all, nothing but a licence to occupy an apartment with the use of the kitchen. Inside the book the attention of the tenant is drawn to certain conditions of the Housing Act, 1936, about the liability of an occupier to prosecution if he permits his dwelling to be over-crowded within the meaning of the Act, but more important than that, are the notices to tenants, mark the word "tenants," not licensees. There is a reference to 11 Geo. 2, c. 19, enacting that "Any tenant "or assistants removing goods to prevent distress shall "pay the landlord double the value of the goods if under "the value of 50*l.*" I omit the immaterial stipulations. The next reference that attracts my attention is that the "tenants must give notice according to the terms of their "tenancy." Another provision is that "the tenant shall "not assign, exchange or sub-let the house, or any part of "same, let apartments or take in lodgers, without the written "consent of the landlord or his agents." Moreover "the "tenant shall not make any alteration in or on the premises "and shall not erect any wireless apparatus, or convert any "dwelling-house into a retail shop, without the written "permission of the landlord or his agents, but use the premises "as a private dwelling-house only," and "the rent is due "in advance if required"—it was so required—and "the "landlord undertakes to pay the rates only so long as the rent "is paid punctually." Those stipulations seem to me to be indicative of something which can be called a letting or a demise; not the less so because, when it was asserted in the Statement of Claim that there had been—at any rate of this part—a sub-let of a furnished tenancy, that statement was not merely formally but categorically denied and in her evidence the tenant attempted to suppress the rent book.

It is admitted that on a certain day in March, the landlord gave the tenant notice to quit expiring on March 29, 1948. On June 15, 1948, in the Croydon county court the landlord claimed possession first of the whole premises, or in the alternative, of the part furnished. It is plainly established in *Prout* v. *Hunter and Another* (1), that the status not only of the whole but of the

(1) [1924] 2 K. B. 736.

part let furnished must be determined as at that date. The next step is to see how things stand at common law. I should have thought that it was indisputable, first, that the letting of premises furnished, or, secondly, that the letting of premises whether furnished or unfurnished—coupling with the corporeal premises the right to share communal facilities with the landlord, or it may be with other tenants, or it may be with both, and whether by way of a grant of an easement or as appurtenant to the corporeal premises—was a well recognized form of letting at common law, and, consequently, that the tenant could get a declaration of his right to use, or an injunction against the withdrawal of the right to use, the facilities which were included, whether by way of easement or as appurtenances. Thirdly, by s. 12, sub-s. 2, proviso (1) of the Rent Restriction Act, 1920, a dwelling-house which is bona fide let at a rent which includes payments in respect of the use of furniture is, for this purpose, excluded from the Act. I need not refer again to the corresponding section of the Act of 1939 because it is quite clear that this particular bungalow comes within the earlier Act. *Prout* v. *Hunter and Another* (1) dealt with the status of a whole house being let furnished at the material date; but I said I would refer to another authority which seems to me to be important on the same point, that is to say, as to determining the status of the premises at the moment when the landlord obtains possession. It was decided in *Leslie and Co., Ld.* v. *Cumming and Others* (2), that, although the premises may, by reason of their becoming furnished premises, have lost their status within the Rent Restriction Acts at some time after the original letting, they may, nevertheless, regain that status before the material date. I do not think it is necessary to cite this case at length; suffice it to say that Roche J. after referring to the case of *Prout* v. *Hunter and Another* (1) said: "In that case the whole of the demised premises had been "let furnished, and were in the occupation of the person "who had so taken them at the date of the writ. In the present "case, so far as the whole of the demised premises are "concerned, they had been let furnished to"—two subtenants—"but their terms of occupation had ended long "before the date of the proceedings," and the learned judge held, without reading more of the judgment, that that made the whole difference. *Barrell* v. *Fordree* (1) decided that if the tenant sub-let part of the premises furnished, with exclusive possession of that part, the combined effect, of s. 12, sub-s. 2, of the Act of 1920 and proviso (I.) thereto is that the landlord can recover possession of that part as distinct from recovering possession of the whole of the premises contained in his demise. I should say, however, that the emphasis on the words "exclusive possession" of the room in question was really directed to the question of whether it could be truly said that part of the premises in question was let as a "separate dwelling," or, to use a later definition, "part of a house being so let," and was not directed to the question whether, to the exclusive possession of that part, there was added the right to share other parts of the whole premises. I say that because I think it is quite plain from the careful collection of authorities that have been laid before us that that was a subject which at that time had not attracted much attention either in their Lordships' House, or in any other court. Fourthly, I come to the other subject matter. The decision in *Neale* v. *Del Soto* (2) set out in the headnote reads as follows: "By an oral "agreement a tenant was let two furnished rooms in a seven "roomed house, together with the use jointly with the land-"lord, of the garage, kitchen, bathroom, lavatory, coal house "and conservatory. *Held*, that there was really a sharing of "the house, each party having the exclusive use of some rooms "and the two parties together having the use in common of "other rooms, and was, therefore, not a letting of the two rooms "as a separate dwelling within the meaning of s. 12, sub-s. 2 "of the Increase of Rent and Mortgage Interest (Restrictions) "Act, 1920." With regard to those facts Morton L.J. said: "Were the two rooms in question in the present case a part "of a house let-as-a-separate-dwelling?" I have read those words "let-as-a-separate-dwelling" in that way to suggest that there is a hyphen between every word. He continues "In my view, they were not. What was let was the two "rooms together with the use, in common with the landlord, "of the garage, kitchen, bathroom, lavatory, coal-house "and conservatory, and it would be misuse of language, to "my mind, to say that the two rooms, and nothing more, "were"—again I interpolate the hyphens—"let-as-a-separate-"dwelling. The real substance of the matter was that there

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(1) [1924] 2 K. B. 736.

(2) [1926] 2 K. B. 417.

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(1) [1932] A. C. 676.

(2) [1945] K. B. 144.

"was a sharing of the house. Each party had the exclusive "use of some rooms and the two parties together had the use "in common of other rooms." *Llewellyn* v. *Hinson* (1) decided that if, by the agreement of tenancy between the landlord and the tenant, the landlord parted with two distinct things, first, the exclusive possession of one or more living rooms, and, secondly, the user, jointly with someone else of one or more other living rooms, it is immaterial whether the someone else is the landlord or another tenant, or tenants, or some other occupier. So far, the matter is at least clear and unambiguous, and I would only venture to say that it is a matter of surprise that the point should first have arisen in the year 1945, although in the intervening years between 1920 and 1945 landlords did not lack vigilant and astute guardians of their interests. It is idle to speculate whether this is because landlords, their advisers and the courts alike, were so blind that the point that was staring everyone in the face in the definition section, entirely escaped their attention, or because no one was bold enough to suggest that the quality of community extended beyond that part of the premises which was shared to that part of which exclusive possession was granted. Only the House of Lords, as regards the past, and perhaps Parliament, as regards the future, can solve this question. This court is clearly bound by the decision. But I am puzzled as regards the subsequent development of the principle, by the decisions on what are "living rooms," the sharing of which prevents the letting from being a "letting-as-"a-separate-dwelling." In *Llewellyn* v. *Hinson* (1), and in *Neale* v. *Del Soto* (2), it was the kitchen and not the bathroom or lavatory with which the kitchen was coupled, which was the living room. In *Sharpe* v. *Nicholls* (3) it was the kitchen and, as Morton L.J. euphemistically observed "the rooms "which are sometimes referred to as the 'usual offices'" which were said to be the living rooms. In *Cole* v. *Harris* (4), Morton L.J. said: "To my mind a kitchen is fairly described "as a 'living room' and thus nobody who shares a kitchen "can be said to be tenant of a part of a house let as a separate "dwelling," and he gave as a reason that the kitchen was often the principal living room where the occupants spend the greater part of the day because it was the warmest part

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(1) [1948] 2 K. B. 385.
(2) [1945] K. B. 144.
(3) [1945] K. B. 382.
(4) [1945] K. B. 474.

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of the house. Yet, the same case is authority for the proposition that the bathroom, the w.c., with the use of the garden for drying clothes which may possibly have been washed in the bathroom, are not living rooms. Yet again, excluding the bathroom and the w.c. in *Kenyon* v. *Walker* (1) the right to use a kitchen expressly for cooking purposes only—thus excluding the family user on which so much stress was laid in *Cole* v. *Harris* (2)—was held to be the sharing of a living room, and this in spite of the fact that, because friction over the cooking had arisen, the landlord had installed a separate cooker in one of the tenants' premises. It is unnecessary to resolve this puzzle because in this case the use of the kitchen is plainly unrestricted, and is therefore directly covered by at least three decisions of this court.

From that line of authorities counsel for the defendant developed a line of argument which ran as follows: He said that it followed from the decision of *Llewellyn* v. *Hinson* (3) that if, as between landlord and tenant there was an agreement for what I will call a "shared letting" within the decisions in *Neale* v. *Del Soto* (4) and other decisions, that does not create a dwelling-house within the meaning of the Act, and it is immaterial whether the agreed sharing is a sharing between the landlord and the tenant, or tenant and tenant, provided always—and this was the point—that the landlord was a party to the agreement of sharing, and only provided the landlord was a party. Secondly, if, subsequent to the tenancy agreement, the tenant, unilaterally as between himself and the landlord, created by a sub-tenancy a sharing of part of the premises between himself and the sub-tenant, that fact, while it enabled him, the tenant, to say that the premises so shared were not a dwelling-house within the meaning of the Act—and therefore to recover them as against the sub-tenant—did not enable the landlord so to do as against either the tenant or the sub-tenant. Thirdly, if the tenant created a sub-tenancy in respect of a furnished tenement, then, first, if the whole of the sub-tenancy is in the exclusive possession of the sub-tenant, the landlord can recover that part by the combined effect of s. 12, sub-s. 2 and proviso (I.) thereto, and on the authority of *Barrell* v. *Fordree* (5); but, secondly, if the sub-tenement is both furnished and shared, though the tenant

(1) [1946] W. N. 203; [1946] 2 All E. R. 595.
(2) [1945] K. B. 474.
(3) [1948] 2 K. B. 385.
(4) [1945] K. B. 144.
(5) [1932] A. C. 676.

can recover from the sub-tenant, the landlord cannot recover against either because proviso (i.) to s. 12, sub-s. 2, does not operate apart from sub-s. 2; the premises, by reason of the sharing, not being a dwelling-house let at a rent which includes the use of furniture. This last point seemed to me to produce the curious result—at any rate as regards the furnished part of the premises—that, whereas a sub-letting furnished enables the landlord to recover at common law either the whole premises, or that part of the premises which is so sub-let, as the case may be, and whereas the sharing of a material part of the premises so that they are not—again employing the hyphen—" let-as-a-separate-dwelling " enables the landlord to recover at common law the whole, or part, as the case may be, so shared, the combination of these two circumstances in relation to a furnished sub-letting deprives the landlord not only of his common law rights, by some process of cancellation, but also of any other rights he may happen to have under the Rent Restriction Acts, because these Acts have ceased to apply to the premises at all. I must say that it sounds very like a reductio ad absurdum, but it was seriously argued that the absurdity of any conclusion upon these Acts is no criterion of that conclusion being wrong; but the apparent absurdity at least tempts one to examine the argument a little closely.

I therefore go back to the first step in the argument. In relation to a furnished sub-letting the unilateral act of the tenant as between himself and the landlord can clearly change the status. That appears from *Prout* v. *Hunter and Another* (1), but it also appears, taking it even more generally, in *Haskins* v. *Lewis* (2) where Greer L.J., speaking in quite general terms, says: " As I view this case it turns on these considerations. " Since the decision of this court in *Prout* v. *Hunter* (1), the " law is that something that the tenant has done, and with " which the landlord has had nothing to do, may alter the " status of the premises so as to take them out of the protection " of the Acts. It seems to me that it follows from that that " if the whole of the premises were let by the tenant as " business premises, he would have so altered the status " of the premises that the Act did not apply to them. Whether, " by reason of another provision of the Act, it would apply " again to the premises if they afterwards again became a " dwelling-house, it is unnecessary to decide. At any rate

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(1) [1924] 2 K. B. 736.

(2) [1931] 2 K. B. 1.

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"the tenant in possession may alter the status of the premises "so as to deprive the occupier for the time being of the benefit "of the provisions of the Act with which we are dealing." I think those observations were of general application.

I am not going to read the case of *Llewellyn* v. *Hinson* (1) again, but it is perfectly plain that the judgments in that case must be read, like all other judgments, in accordance with the subject-matter which is being dealt with. The subject-matter in that case was that the landlord himself had in fact made the agreement, and therefore references to the landlord having made the agreement were references to that fact. There is not one word from beginning to end of the judgments which even hints that this is essential to the decision. I am speaking in the presence of one of the parties to the judgment, who will correct me if I am wrong. There is not a word which even hints at a decision that the landlord being a party to the sharing agreement is essential in order to reverse the process of the Rent Restriction Acts. Fundamentally the argument is reduced to a single sentence in *Stevenson* v. *Kenyon, Kenyon* v. *Walker* (2), to which I have already referred as being an authority in connexion with the user of a kitchen for cooking purposes only. Counsel for the plaintiff, in what I thought was an admirably clear and convincing way, showed that this case and that particular sentence had nothing whatever to do with this point. I will read the sentence and explain why I think it has nothing to do with the present case. In that case, the tenant sought to recover from the sub-tenant in the first of the two actions on the ground that as between himself and the sub-tenant he had created, by the right to use the kitchen, a sharing agreement, and it was held that he was so entitled. It followed therefore that the sub-tenant's premises were not a "dwelling-house" to which the Acts applied. In the other action the landlord sought to recover as against the tenant on the ground that the tenant was alleged to be overcharging rent to the sub-tenant within the meaning of s. 4 of the Act of 1933 (3). In the circumstances it is a little curious that the landlord entered into an alliance with the sub-tenant. It was a natural alliance in the sense that I infer, though it is not expressly stated, that both of them desired to prove as against the tenant that the tenant was overcharging rent to the sub-tenant; but, in order to do so under s. 4 of the Act of 1933, it was essential to prove that the premises were a dwelling-house within the meaning of the Act, to which the sharing agreement, if established, was absolutely fatal. The alliance was unnatural inasmuch as the landlord's real cause of action was, or should have been, a possession action against both the tenant and the sub-tenant on the ground that they had entered into this sharing agreement. There is nothing whatever to show that any such case was raised. Indeed, the facts laid before the learned county court judge were inconsistent with that, and Asquith L.J., who was a member of the Court of Appeal in that case has made it perfectly plain to us that no such question was ever raised in the appeal at all. Morton L.J. when dealing in his judgment with the claim of Stevenson, the landlord, against the tenant, said this: "The result is that, in my view, there was at all material "times a sharing of this house between Kenyon"—that is the tenant—"on the one hand, and Mrs. Walker and her "mother, who lived with her, on the other"—that is the sub-tenant. "If that is the right view, no other point arises on "either of these appeals." The learned Lord Justice then comes to the only sentence which deals with the claim of the landlord against the tenant: "Stevenson cannot recover "possession against Kenyon because the case does not come "within s. 4 of the Act of 1933." That is because the finding in the sentence before prevents the house from being a "dwelling-house" within the meaning of the Act, so that the words in s. 4 ". . . . an order or judgment for the recovery "of possession of a dwelling-house to which the principal . . . . "Acts apply . . . . may be made or given . . . . if the "court is satisfied that the rent charged . . . . for any "sub-let part . . . . was in excess . . . ." could not possibly apply. Morton L.J. goes on: "Stevenson cannot recover "possession against Kenyon because the case does not come "within s. 4 of the Act of 1933, and Kenyon can recover "possession as against Mrs. Walker and Mrs. Springer because "the arrangement they came to is not protected by the Rent "Restriction Act. Thus, the judge was right in refusing

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(1) [1948] 2 K. B. 385.

(2) [1946] W. N. 203; [1946] 2 All E. R. 595.

(3) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 4: ". . . . an order or "judgment for the recovery of "possession of a dwelling-house to "which the principal Acts apply ". . . . may be made or given ". . . . if the court is satisfied "that the rent charged . . . . for "any sub-let part of the dwelling-"house . . . . was in excess . . . ."

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"possession to Stevenson and granting it to Kenyon, and "this appeal fails."

That has got absolutely nothing whatever to do with this case, and, once it is understood that there is no authority to the contrary, and that the whole of this case, built round that one sentence in *Stevenson* v. *Kenyon* (1), collapses, the way is open to this simple proposition. That the grant of a right to share a house, in which the grantor has the sole interest, diminishes the grantor's interest to the extent of the grant; and, if the thing shared is of such a nature as to prevent the part of the premises in respect of which the right is granted from being—again employing the hyphens—"let-as-a-separate-dwelling" in the hands of the grantee, the corresponding diminution of the rights retained by the grantor must inevitably have the same result in respect of any part of the premises affected thereby. This result has at least the merit of making sense instead of nonsense of the authorities. The landlord's reversion, as such, remains unaffected by the Rent Acts; all that the Rent Acts do is to impose restrictions on his immediate enjoyment of it. So, although the restrictions are less harsh to the landlord, does the Courts (Emergency Powers) Act, 1943.

The point as regards a furnished sub-let is contained in every Act from the year 1920 onwards. The point as regards a sharing agreement was settled in the year 1945—certainly as regards the use of a kitchen—and this agreement was made in February, 1948. What ground of complaint has the appellant, if, of her own volition, she makes arrangements which divest both herself and her tenancy of the protection of the Rent Acts, and so reduce the restrictions imposed on the landlord to those appropriate to an ordinary ejectment action? That, and nothing else, is precisely the effect of the learned judge's judgment in this case.

In my opinion the judgment was right and this appeal fails.

ASQUITH L.J. I am of the same opinion. It has taken a long and complex argument to reach the real point to which the case narrowed down. That point is whether at the time of the plaint (for this is the material time) this house was let as a separate dwelling, and therefore protected by the Acts from orders for possession, notwithstanding that at that

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(1) [1946] W. N. 203; [1946] 2 All E. R. 595.

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time part of the house was the subject-matter of what is familiar in these courts as a "sharing agreement" between the tenant and the sub-tenant. For the reasons given by my Lord, I agree that the answer to that question is "No," and that it is immaterial whether or not the landlord was a party to or privy to the sharing agreement, or whether that agreement was purely a matter between the tenant and sub-tenant. In either case, it is not possible to say that at the material time this house was let as a separate dwelling, because part of it was not separately let. Accordingly, neither in part nor in whole is the house protected, and the order for possession should be affirmed.

VAISEY J. I agree in the result arrived at by my Lords, and I entirely agree with the reasons ennunciated by them. I believe that I could add some reasons of my own, but, if I were to do so, I might easily by inadvertence add to the already existing complexity of the reported decisions without serving any useful purpose whatsoever. I therefore content myself with saying that the judgment of the learned county court judge in this case was, in my view, perfectly correct. I can find no ground for coming to any other conclusion and agree that this appeal should be dismissed.

Appeal dismissed.

Feb. 18. *Leave* was given on terms to appeal to the House of Lords.

Solicitors for the plaintiff: *Clutton, Moore & Lavington, for A. Rawlence, Croydon.*
Solicitors for the defendant: *Beaumont, Son & Rigden.*

L. F. J. McD.

FREDERICK BERRY LD. *v.* ROYAL BANK OF SCOTLAND.

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Landlord and tenant—Covenant—Property of landlord retained in his occupation below demised premises—Tenant not to erect signs either on demised premises or on landlord's property without landlord's consent—Consent not to be unreasonably withheld—Effect quoad landlord's property—Refusal of consent not unreasonable.

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By an underlease dated May 28, 1947, the defendant demised to the plaintiffs the third floor premises of No. 64, New Bond Street, London. The underlessees covenanted with the bank (inter alia) not to hang out or exhibit signs or advertisements either on or from the demised premises or at the main entrance to the building (which had not been demised) without the previous consent of the lessors, such consent not to be unreasonably withheld. The defendants refused to allow the plaintiffs to place their name plate at the main entrance and the plaintiffs thereupon claimed a declaration that the consent was unreasonably withheld and that they were accordingly entitled to exhibit their plate without such consent.

Held, that the refusal to sanction the proposed additional plate was not unreasonable, but in any event the covenant could not be construed as a covenant to grant the plaintiffs the right to exhibit their name plate on that part of the premises not demised to them unless there were reasonable grounds for refusing it.

ACTION.

By an underlease dated May 28, 1947, the defendant bank (which held a 2,000-year term of No. 64, New Bond Street, London and retained occupation of the ground floor, hall and staircases) demised to the plaintiffs the third floor thereof for a term of five years from June 24, 1947. The parcels in the underlease were the third floor and easements of way over the entrance hall and staircases but did not include any easement to erect sign boards on the property retained in its occupation by the bank, such as the entrance or hall. The underlessees covenanted with the bank (inter alia) not to hang out or exhibit signs or advertisements either on or from the demised premises or at the main entrance to the building without the previous consent of the lessors, such consent not to be unreasonably withheld. The plaintiffs had never exhibited or applied for consent to the exhibition of any sign or advertisement on the third floor. During the currency of their previous tenancy they had placed within the main entrance hall (without objection by the bank) a signboard showing their name and business; and that board, together with a number of uniform small nameplates next to the letter box on the outer main door, one of which indicated the plaintiff's name and floor, and all set up by the bank itself, remained in position before and after the date of the new underlease and before and after the commencement of the new term. Immediately after the term created by the underlease commenced on June 24, 1947, the plaintiffs began and continued to press the bank for leave to place another sign twelve inches by eight inches indicating their own name on the outer marble pilaster of the building alongside or beneath the bank's own nameplate, which at all material times alone appeared on that pilaster. The bank (which had refused to allow that during the previous tenancy) refused to consent. The plaintiffs claimed a declaration that the bank's refusal of such consent was unreasonable and that the plaintiffs were entitled to erect their sign without the bank's consent.

Glyn-Jones K.C. and *Teague* for the defendants. The language of the covenant could not create a right to an easement. That part of the premises on which the tenants wished to exhibit their nameplate was not part of the demised premises. The tenants claimed that the negative covenant gave them a right to do what apart from the covenant would have been trespass. The tenants were trying to spell out of a negative covenant a positive right.

C. H. Duveen for the plaintiffs. Every word in a document must be given a meaning. The leases of the years 1944 and 1947, must be compared. It was the intention of the parties that the tenants were to have the right to exhibit their nameplate on the outside of the main entrance to the premises, subject to the landlord having a reasonable right to withhold his consent. The covenant only made sense if every word in it was given an operative construction. He referred to *Lambert and Another* v. *F. W. Woolworth & Co. Ld.* (1).

Cur. adv. vult.

Feb. 24. LORD GODDARD C.J. The only questions that I have to decide are whether the plaintiffs are entitled to call upon the defendants to give their consent, and if so whether the latter have reasonable grounds for refusing it. If a tenant takes only an upper floor of a building, and has no more than a right to use the entrance hall for the purpose of approaching the premises demised, he must stipulate for the right to put a nameplate outside the premises, other than on that part demised to him, if he desires this convenience. It is said that on the true construction of the covenant to which I have referred the tenant has been granted that right, though the

(1) [1938] Ch. 906.

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defendants have reserved to themselves the power to object to a particular notice or its position on reasonable grounds. I cannot so construe the covenant.

The question that falls for decision here has usually arisen in relation to the right to assign or sub-let or to the user of premises. In all those cases, in the absence of a restrictive covenant, a tenant can assign his lease, or use the premises as he likes, and where the lease has only contained a restrictive covenant by the tenant, it has, I think, always been held that the right of the tenant is to apply for permission, and if refused to assign or use the premises as he chooses, and defend any action that is brought against him by showing that the withholding of consent is unreasonable. A good illustration of this will be found in *Treloar* v. *Bigge* (1), a case which has often been cited and, I think, never disapproved. The same principle seems to me to underlie *Smith* v. *The Mayor of Harwich* (2). In neither case would the court imply a covenant by the defendants that they would give consent. No doubt there have been cases in which there has been an express covenant by the lessor not to withhold his consent unreasonably; for example, *Ideal Film Renting Co. Ld.* v. *Nielsen* (3) and, if there is such a covenant, the lessee can not only disregard an unreasonable refusal but can bring an action for damages if it is withheld. In this case it is conceded that unless there is at least an implied covenant by the lessors the plaintiffs could have no right to put up the plate on the outside of the premises. I do not find it necessary to go through the many cases in which positive or negative covenants have been held to be in the substance negative or positive respectively. I cannot find that there is here an implied covenant that the defendants would give their consent, unless they had a reasonable ground for refusing it. The words, with regard to the withholding of the consent, would operate and, therefore, a meaning can be given to them if the plaintiffs desired to put up a notice or sign outside the third floor.

That is enough to dispose of the case, but lest it should go further, I ought to express my opinion on whether the consent was unreasonably withheld if the plaintiffs are in a position to demand it. In my opinion it is for the plaintiffs to show that the refusal was unreasonable and not for the defendants

(1) (1874) L. R. 9 Ex. 151.
(2) (1857) 2 C. B. (N. S.) 651.
(3) [1921] 1 Ch. 575.

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to prove that it was not. This was distinctly held by the Court of Appeal in *Shanly* v. *Ward* (1).

I was referred to a dictum of Slesser L.J. in *Lambert* v. *F. W. Woolworth & Co.* (2), in which he said: "the onus "of proving that the withholding is unreasonable is on the "tenant, but if the landlord gives no reason but merely refuses, "that, in itself, I think, puts upon him the duty of showing "that his action was reasonable." The other members of the court did not express any view on this subject, and in any case, I do not think that the dictum of the Lord Justice means any more than that if the landlord gives no reason the court would more readily imply that the withholding was unreasonable. That a plate would be a convenience to the plaintiffs is, I think, clear, but though a request may be reasonable that does not mean that a refusal to grant it is necessarily unreasonable. The day after the hearing I took the opportunity of seeing the outside of the premises, and, in my opinion, it was not unreasonable for the bank to feel that they had given the plaintiffs all the publicity that they could reasonably require on the ground floor, and that accordingly their refusal to sanction the additional plate was by no means unreasonable.

The action fails and must be dismissed with costs.

Solicitors for the plaintiffs: *Forsyte, Kerman and Phillips.*
Solicitor for the defendant: *B. P. Webster.*

(1) (1913) 29 T. L. R. 714. (2) [1938] Ch. 906.

L. F. J. McD.

BRITISH BANK FOR FOREIGN TRADE LD. *v.* NOVINEX LD.

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Dec. 10, 13.

Bucknill, Cohen and Singleton L.JJ.

Contract—Commission—Repeat orders—" Undertake to cover you with " an agreed commission on any other business transacted with your " friends "—In consideration you " to put us in direct touch with " your friends "—Consideration executed—Contract enforceable—Reasonable commission—All business so transacted included, whether attributable or not to the introduction.

The defendants by letter to the plaintiffs agreed to buy from clients of the plaintiffs 20,000 oilskin suits. In that letter dated

December 9, 1946, the defendants wrote: "We confirm that "we have agreed to cover you on this transaction with a commission of 4*d.* per oilskin suit . . . . We also undertake to "cover you with an agreed commission on any other business "transacted with your friends. In return for this you are to "put us in direct contact with your friends." The plaintiffs put the defendants in direct contact with their friends—the P. and G. Trading Co. Ld. In August, 1947, the defendants bought from P. and G. Trading Co. Ld. by two transactions: 1,000 and 20,000 oilskin suits—the second transaction not arising directly from the introduction of the plaintiffs, but from the defendants having seen an advertisement in a newspaper.

The plaintiffs claimed commission on these two transactions, but the defendants denied liability to pay commission on either, on the ground that there was no legally enforceable bargain arising under the terms of the letter of December 9, 1946, the agreement being to pay commission to be agreed upon and no such commission having been agreed. With regard to the second transaction, the defendants also claimed that they were not liable to pay commission, on the ground that the transaction did not arise from the plaintiffs' introduction. The trial judge accepted both submissions.

Held, that since the contract was executed on one side, by the plaintiffs having put the defendants in direct touch with the P. and G. Trading Co. Ld., there was necessarily implied from the conduct of the parties a contract that, in default of agreement, a reasonable sum was to be paid for commission.

Held also that the language of the letter being unambiguous, the defendants agreeing to pay commission "on any other "business transacted with your friends" (being a reasonable arrangement to prevent litigation on the often difficult issue whether a particular transaction did or did not arise from the introduction), the defendants were liable to pay commission on that transaction, although it arose from the defendants having seen an advertisement in a newspaper.

The court approved the statement of the trial judge as to the law applicable to the first point:—"The principle to be deduced "from the cases is that if there is an essential term which has yet "to be agreed and there is no express or implied provision for "its solution, the result in point of law is that there is no binding "contract. In seeing whether there is an implied provision for "its solution, however, there is a difference between an arrangement which is wholly executory on both sides and one which "has been executed on one side or the other. In the ordinary "way, if there is an agreement to supply goods at a price 'to be "'agreed,' or to perform services on terms 'to be agreed,' then, "although, while the matter is still executory, there may be no "binding contract, nevertheless, if it is executed on one side, "that is, if the one does his part without having come to an "agreement about the price or the terms, then the law will say "that there is necessarily implied, from the conduct of the parties,

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"a contract that, in default of agreement, a reasonable sum is "to be paid."

But the court held, that, in applying that law, there was no difference in principle between the case where the service which was rendered was labour and that, as here, where the service was an introduction, and that there was no reason why it should not apply to all follow-up or repeat transactions. And they made a declaration that the defendants were liable to pay a reasonable commission on the value of any transaction between the defendants and the P. and G. Trading Co. Ld., whether in oilskin suits or other commodities, and they ordered the defendants to pay to the plaintiffs a commission of ¼*d.* per oilskin suit.

APPEAL from a judgment of Denning J.

By a letter to the plaintiffs dated December 9, 1946, signed by one Vischer, a director of the defendant company, it was agreed that the defendants were willing to buy from clients of the plaintiffs 20,000 oilskin suits. The letter continued:— "We confirm that we have agreed to cover you on this "transaction with a commission of 4*d.* per oilskin suit. This "amount would be payable to you after settlement with "your buyers. We also undertake to cover you with an "agreed commission on any other business transacted with "your friends. In return for this you are to put us in direct "contact with your friends." The plaintiffs put the defendants in direct touch with the plaintiffs' friends, Messrs. Pritchard and Gee Trading Co. Ld., who were to sell the oilskin suits. There was a dispute as to the payment of the commission of 4*d.* per suit on the original transaction, but this was paid in September, 1947. In January, 1948, the plaintiffs asked for details of the business done by the defendants with Messrs. Pritchard and Gee Trading Co. Ld. during 1947, and suggested that they "should now meet together to agree "the commission to be paid to us thereon." The defendants repudiated liability, and the plaintiffs sued the defendants for a reasonable commission on any business subsequent to the letter of December 9, 1946, and they claimed a declaration that the defendants were liable to pay a commission of 5 per cent. or alternatively 3 per cent. on the value of the transactions, or, alternatively, 4*d.* per suit. They asked for an account of the transactions and further or, in the alternative, damages for breach of contract. The defendants admitted that there were three transactions for one of which, as being linked with the original transaction, they admitted liability to pay commission. There were two other transactions in

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August, 1947: (1.) the defendants bought 1,000 oilskin suits from Messrs. Pritchard and Gee Trading Co. Ld., at a price of 5*s*. 6*d*. per suit—£275; and (2.) 20,000 oilskin suits at a price of £5,000.

The defendants denied liability to pay commission on either transaction, first on the ground that there was no legally enforceable bargain arising under the terms of the letter of December 9, 1946, the agreement being to pay commission to be agreed upon and no such commission having been agreed. Secondly, as to the second transaction, the defendants said that it was only an agreement to pay commission arising directly from the introduction by the plaintiffs of Messrs. Pritchard and Gee Trading Co. Ld., and they contended and established that the second and larger transaction arose from an advertisement in "The Times" newspaper. Denning J. accepted both submissions and gave judgment for the defendants. The plaintiffs appealed.

Quintin Hogg for the plaintiffs. The plaintiffs are entitled to commission under the contract contained in the letter of December 9, 1946, on the two transactions, since the contract was no longer executory: the plaintiff had put the defendants in direct contact with their friends, Pritchard and Gee Trading Co. Ld. and the court will assess the commission. See *Foley* v. *Classique Coaches Ld.* (1), where there was an arbitration clause, but that was immaterial. In *Hillas & Co. Ld.* v. *Arcos Ld.* (2), the House of Lords stated that they had not laid down universal principles of construction in *May & Butcher* v. *The King* (3), and that each case must be decided on the construction of the particular document. The only general principle seems to be to examine the facts and, if the parties have agreed that remuneration has to be paid and that has to be agreed, then there is an enforceable contract; but if the parties have stipulated nothing at all on this matter, then the contract is void for uncertainty. In *May & Butcher* v. *The King* (3), the alleged contract was executory. Once there has been an executed consideration, there must be a contract to pay a reasonable price. *Scammell & Nephew Ld.* v. *H. C. & J. G. Ouston* (4) was decided on facts which render it of no use for the decision in this case. By s. 8 of the Sale of Goods Act: "The price in a contract

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(1) [1934] 2 K. B. 1.

(2) (1932) 147 L. T. 503; 38 Com. Cas. 23.

(3) [1934] 2 K. B. 17 *n*.

(4) [1941] A. C. 251.

"of sale may be fixed by the contract or may be left to be "fixed in manner thereby agreed or may be determined "by the course of dealing between the parties." Then the second sub-section provides that where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. See *Bryant* v. *Flight* (1), *Jewry* v. *Busk* (2), and *Bird* v. *M'Gaheg* (3), and Bowstead on Agency (10th ed.), art. 64, at p. 118. See also the observations of Lord Wright in *Hillas & Co. Ld.* v. *Arcos Ld.* (4).

The contract made by the defendants' letter to the plaintiffs of December 9, 1946, is unequivocal—to pay commission to the plaintiffs on all future transactions between the defendants and the plaintiffs' friends—not to pay on such future business as might result from the introduction by the plaintiffs of their friends, Pritchard and Gee Trading Co. Ld., to the defendants. Further, the contract was to pay commission on all future transactions between these persons, whatever the commodities sold. And the plaintiffs claim a declaration to that effect. See *Wilson* v. *Harper* (5) and *Bilbee* v. *Hasse* (6). (He was stopped on this issue.)

Lastly the court should treat the contract as repudiated by the defendants and award damages.

Eustace Roskill for the defendants. If the parties to an agreement have left unsettled some question which can only be settled by further agreement between them and in no other way and there has been no such agreement, then there is no contract which is enforceable at law. But if the parties have made an agreement containing stipulations and, if those not expressly agreed can be properly implied by the court, or if the parties have provided a means for determining any stipulation not expressed in the contract, as for example, by arbitration, as in *Foley* v. *Classique Coaches Ld.* (7)—in either of these cases there is a contract enforceable at law. This agreement falls into the first-mentioned class. In *Hillas & Co. Ld.* v. *Arcos Ld.* (8), the contract was partly executed but the House of Lords did not support the option clause on that ground. The point was not taken in any one of the three courts.

(1) (1839) 5 M. & W. 114.

(2) (1814) 5 Taunt. 302.

(3) (1848) 2 Car. & K. 707.

(4) 147 L. T. 503, 574; 38 Com. Cas. 23, 34—46.

(5) [1908] 2 Ch. 370.

(6) (1889) 5 T. L. R. 677.

(7) [1934] 2 K. B. 1.

(8) 147 L. T. 503; 38 Com. Cas. 23.

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[Cohen L.J. That contract remained executory until something was done under the option.]

In *May & Butcher Ld.* v. *The King*, Lord Dunedin said (1): "To be a good contract there must be a concluded bargain, "and a concluded contract is one which settles everything "which is necessary to be settled and leaves nothing to be "settled by agreement between the parties. Of course it "may leave something which still has to be determined, but "then that determination must be a determination which "does not depend upon the agreement between the parties." That passage is conclusive as to this case. See also the rest of Lord Dunedin's judgment. The case of *British Homophone Ld.* v. *Kunz and Crystallate Gramophone Record Manufacturing Co. Ld.* (2) does not take the case any further. In *Scammell & Nephew Ld.* v. *H. C. & J. G. Ouston* (3) a case of an executory contract the two principles of Lord Wright's decision will be found at pp. 269—270 of the report. The first reason is not in point but the second is: that the parties never in intention, nor even in appearance, reached an agreement. That was so in this case. It is submitted that on this issue there is no difference between an executory and an executed contract.

If the plaintiffs are right and this agreement applies to all commodities whether the business was introduced by the plaintiffs or not, that is a very relevant consideration as to what is the proper amount of the commission, should any be due. If my contention is wrong in law, what is sued for is a reasonable commission. There are no materials on which damages can be assessed.

Quintin Hogg in reply. Where there is no custom, the court will assess what is a reasonable commission.

Bucknill L.J. I will ask Cohen L.J., to give the first judgment.

Cohen L.J. The defendants denied liability to pay commission on the two transactions, in August, 1947, firstly, on the ground that there was no legally enforceable bargain arising under the paragraph in the letter of the defendants of December 9, 1946: "We also undertake to cover you with an agreed

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(1) [1934] 2 K. B. 21 *n.*

(2) (1935) 152 L. T. 589.

(3) [1941] A. C. 251.

"commission on any other business transacted with your "friends. In return for this you are to put us in direct "contact with your friends." They contended that it was an agreement to pay a commission to be agreed, and no such further agreement had been reached. Alternatively, they said that, at any rate as to the 20,000 skins, they were under no liability, because, on the true construction of the letter, if the arrangement constituted an enforceable bargain, it was only a contract to pay commission on business arising directly from the introduction by the plaintiffs of Messrs. Pritchard and Gee Trading Co. Ld. to the defendants and the second transaction arose from an advertisement in "The Times."

The learned judge appears to have accepted both submissions. He said: "I am quite clear that the 20,000 transaction in "August, 1947, had nothing to do with the original "transaction," and on that ground he refused to allow any commission thereon. But, in my opinion, there is nothing in the agreement limiting the commission to commission on orders directly attributable to the introduction. The language used seems to me quite unambiguous. What they say is that the commission is to be payable "on any other business "transacted with your friends." I find it difficult to imagine wider language than that used in the letter, and I am unable to find any circumstances which would justify us in cutting down that wide language. It seems to me to have been a reasonable arrangement in order to prevent litigation on the issue (which is often difficult for a plaintiff to establish) whether a particular item of business did arise out of an original introduction. The defendants deliberately used language which would obviate the necessity of the court ever having to go into that rather difficult inquiry.

I turn next to the main question: Is this an enforceable agreement? A number of authorities have been cited to us, to which I do not propose to refer in detail, because, in my view, the effect of the authorities is stated correctly in the learned judge's judgment where he said: "The principle "to be deduced from the cases is that if there is an essential "term which has yet to be agreed and there is no express or "implied provision for its solution, the result in point of law "is that there is no binding contract. In seeing whether "there is an implied provision for its solution, however, there "is a difference between an arrangement which is wholly "executory on both sides, and one which has been executed "on one side or the other. In the ordinary way, if there is "an arrangement to supply goods at a price 'to be agreed,' "or to perform services on terms 'to be agreed,' then although, "while the matter is still executory, there may be no binding "contract, nevertheless, if it is executed on one side, that is, "if the one does his part without having come to an agreement "as to the price or the terms, then the law will say that there "is necessarily implied, from the conduct of the parties, a "contract that, in default of agreement, a reasonable sum "is to be paid." With that statement of the principle of law, I respectfully agree. My difference with the learned judge is only on the question whether he has correctly applied that statement of principle to the facts of this case.

The learned judge continued: "The difficulty is to apply "the distinction in this case. This is not a case of services "to be rendered for wages or goods to be supplied for a price. "It is an arrangement in regard to repeat transactions or "follow-up transactions, in respect of which the person "effecting the original introduction has performed no fresh "service whatever apart from his original introduction. "He has, however, done his part. He has effected the original "introduction." Pausing there for a moment, I can see no difference in principle between a case where the service which is rendered is labour and a case where the service is an introduction. Whatever the value of the service may be, the plaintiffs have rendered to the defendants the service which was intended to be the consideration for the agreement to pay commission on future orders. I cannot think that there is a difference in principle between such a service and an agreement to serve an employer as a clerk or in any other capacity. The judge then said that, in his view, it was impossible to apply the principle as regards ordinary service contracts to the present case, because he said that there was so much left in the air. He said: "Is it to be implied that "he is to receive a reasonable commission on all follow-up "transactions?" I have already dealt with that point. It seems to me on that point the agreement is plain and unambiguous and is so expressed. Then he said: "Is "commission to be payable until the crack of doom?" I think the observation applies that if the defendants go on dealing with Pritchard and Gee Trading Co. Ld. until the crack of doom, they will have to go on paying commission to the plaintiffs, if they are in existence, until that doom occurs. As was pointed out in *Levy* v. *Goldhill* (1) by Peterson J., parties having entered into a bargain may have it in their power to put an end to it. The defendants in this case need not continue to deal with Messrs. Pritchard and Gee Trading Co. Ld. I feel no difficulty on either of these points. Then the learned judge said: " Is it confined to oilskins or does it apply to " business of an entirely different kind, in different commodities, " by different departments, and so forth ? " Here again I can find no ambiguity in the agreement, and I do not therefore feel any difficulty in answering this question in favour of the second alternative.

Then the judge continued on what, I think, is the principal issue: " And what is the amount of the commission to be ? " If there is no usual or customary commission, how can " anyone say what is a reasonable commission for a follow-up " transaction or a repeat transaction ? That appeared quite " clearly from the evidence which showed that when parties " are negotiating for the price they are going to pay, they take " account of any commission they have to pay to agents." Denning J., went on to say that this showed that the agreement was too vague to be enforced. But the agreement had said in terms, instead of by implication: " we also undertake " to cover you with a reasonable commission on any other " business transacted with your friends." Denning J. seems to have regarded that condition as being too vague to be enforceable. I cannot agree with this view. I think that a court should take the view that a jury properly directed would be able to arrive at a proper conclusion as to what in the circumstances of this case is a reasonable commission.

What then is a reasonable commission on the facts of this case ? There were a number of alternatives suggested by the witnesses called by Mr. Roskill for the defendants who found himself compelled to supply the evidence which Mr. Hogg for the plaintiffs was unwilling to supply because he preferred to rely on the letter and to say that *4d.* a skin must be taken to be a reasonable commission. I do not propose to review that evidence in detail. Although the learned judge came to the conclusion that no commission was payable, he did express the view that, on the 1,000 oilskins transaction, a reasonable commission would not exceed one farthing on each

(1) [1917] 2 Ch. 297, 300.

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oilskin. Speaking for myself, I am prepared to accept that as a reasonable commission on all the evidence, not only as regards the 1,000 transaction, but also as regards the 20,000 which would mean that to date the amount receivable would be 21*l.* 17*s.* 6*d.* Mr. Hogg did suggest that we ought to treat the contract as repudiated and award damages, but having regard to the course which was pursued and to the evidence that was called in the court below, I do not think that we can finally dispose of the matter unless the parties ask us to do so, in which event we should have to estimate some small sum covering the possibility of future business.

The court, should, I think, make a declaration that the defendants are liable to pay a reasonable commission on the value of any transaction between the defendants and Messrs. Pritchard and Gee Trading Co. Ld. after December 9, 1946, and order the payment of commission at the figure I have mentioned in respect of the two transactions in August, 1947.

Bucknill L.J. I agree that the appeal should be allowed for the reasons given by Cohen L.J. in his judgment, and I have nothing to add.

Singleton L.J. I agree.

Solicitors for the plaintiffs: *Herbert Baron & Co.*
Solicitors for the defendants: *Wm. A. Crump & Son.*

C. G. M.

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Dec. 20, 21.
Bucknill and Singleton L.JJ.

DAY *v.* WILLIAM HILL (PARK LANE) LD.

Gaming and Wagering—Account stated—Bookmaker's weekly statement of account with client setting off wins and losses—Balance on account of wins by client stated as carried forward—Action brought by client as on account stated—Practice—Application to strike out statement of claim—As disclosing no reasonable cause of action—Action frivolous and vexatious—Inherent jurisdiction of court—R. S. C. 1883, *Or.* 25, *r.* 4.

A bookmaker's weekly account sent to a client, containing a record of wins and losses made by the client on bets made by him during the week which, when set off against each other, showed a balance due from the bookmaker to the client, followed by the letters " C. F." (carried forward), is not an account stated on which the client can sue the bookmaker some months subsequently, since it is not an absolute acknowledgment made by the bookmaker to the client of a debt due from him to the client and payable at the time of action brought. (See Bullen and Leake's Pleadings (3rd. ed.), at p. 52.)

INTERLOCUTORY appeal from an order of Pritchard J. in chambers. The plaintiff's claim, as indorsed on the writ, issued on June 28, 1948, was " for 754*l.* 18*s.* 7*d.*, being the " amount due and payable to the plaintiff by the defendants " under and by virtue of an agreement made on the 9th day " of February, 1948."

The defendants asked for further and better particulars of the alleged agreement stating whether the same was oral or in writing. In reply the plaintiff gave the following particulars : " The said agreement was in writing. It was " contained in two documents received by the defendants " on respectively the 10 and 13 February, 1948 ; and the sum " of 754*l.* 18*s.* 7*d.* is arrived at as to 695*l.* in respect of the " transaction referred to in the first of the said documents " and as to the balance in respect of the transaction referred " to in the second of the said documents."

Subsequently, pursuant to order, the following statement of claim was delivered : (1.) " On or about February 7, " 1948, the sum of 49*l.* 5*s.* 3*d.* was found to be due from the " defendants to the plaintiff on accounts stated and settled " between them and contained in a written account to the " plaintiff from the defendants upon their printed letter-head " which was dated February 7, 1948. The defendants have " failed to pay to the plaintiff the said sum of 49*l.* 5*s.* 3*d.* " (2.) On or about February 9, 1948, under an agreement " between the parties contained in the plaintiff's letter of " that date to the defendants accepting the offer made by " the defendants in their letter to the plaintiff dated " December 8, 1947, and the printed enclosure therewith, " the defendants became indebted to the plaintiff in the sum " of 695*l.* 15*s.* 0*d.* The defendants have failed to pay to the " plaintiff the said sum of 695*l.* 15*s.* 0*d.*

" And the plaintiff claims :—
" (A) 49*l.* 5*s.* 3*d.* under paragraph 1.
" (B) 695*l.* 15*s.* 0*d.* under paragraph 2."

The letter of December 8, 1947, referred to in para. 2 of the statement of claim was from the defendants to the plaintiff

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DAY v. WILLIAM HILL (PARK LANE), LD.

in these terms: "We have pleasure in advising you that we "have now added your name to our clients' register for a "deposit account. We thank you for your remittance of 25*l.* "which has been placed to the credit of your account, and you "are, therefore, now entitled to invest up to this or any "amount which might be standing to your credit at the time "of placing your commission." The third paragraph dealt with the the replacement of the deposit should it become exhausted, the fourth with the rendering of an account each week and the payment of any amount won over the deposit, the fifth stated that the defendants' book of rules was enclosed—"the basis of all transactions between us"—the sixth gave the client his account number and the seventh stated that the defendants looked forward to being entrusted with his valued commissions.

The document of February 9 referred to in para. 2 of the statement of claim was in three columns with two additional columns, which were blank, for official use. In the first column under the heading "Stake" were the words and figures in column: "3X; 50/- win doubles; 50/- win treble." In the second column under the heading "Name of selection" were the words in column: "Salvaged; Secret Service; "Laurel Crown." In the third column under the heading: "Track or Meeting" were the words in column: "Leicester, "Leicester, Leicester." Lower down the second column were the words in column: Win 718*l.* 8*s.* 9*d.*; P. M.—; W. 29; "C.—." At the foot of the sheet were the words: "Total "amount invested 10*l.*, February 10, 1948, and then "Date "of race, Feb. 9, 1948."

The document referred to in para. 1 of the statement of claim was addressed Hill House, London, W. 1., headed: "J. J. Day, Esq. In account with William Hill (Park Lane) "Ld. (D. S. 838). For the week ending February 7, 1948." The document was in seven columns headed: "Date; Horse; "Amt. invested; You Lose; You Win; Total Daily Loss; "Total Daily Win." After entries in the first five columns there were two entries under "Total Daily Loss" for dates 31.1. and 4.2. being 1*l.* 11*s.* 3*d.*, and 17*l.*, making 18*l.* 11*s.* 3*d.* There were three entries under "Total Daily Win" for dates 2.2. and 4.2. and 6.2. being 7*l.* 8*s.* 0*d.*; 1*l.* 5*s.* 3*d.*, and 15*l.*, making 23*l.* 13*s.* 3*d.* At the end of the sixth column 18*l.* 11*s.* 3*d.* was deducted from 23*l.* 13*s.* 3*d.*, making 5*l.* 2*s.* 0*d.* To this was added the sum of 3*l.* 5*s.* 9*d.* from a source which did not appear, making 8*l.* 7*s.* 9*d.* To this was added 40*l.* 17*s.* 6*d.* "in hand" and the final figure was: "By cash. C. F. "49*l.* 5*s.* 3*d.*"

The defendants moved before a master to strike out the statement of claim under Or. 25, r. 4, of the Rules of the Supreme Court (1). The defendants supported their application by an affidavit sworn by the secretary of the company exhibiting copies of the documents referred to in the statement of claim. Objection was taken to the admission of the affidavit on the ground that under Or. 25, r. 4, the master could only look at the pleadings. The master said that, apart from the rule, the court had inherent jurisdiction to strike out a pleading as an abuse of the process of the court and on that issue admitted the affidavit. The master, no amendment apparently having been made to the summons, intending to treat the summons as amended, struck out the statement of claim and dismissed the action with costs. On appeal to the judge in chambers, Pritchard J. upheld the master's decision, refusing leave to appeal. The plaintiff obtained leave to appeal from the Court of Appeal and appealed.

Caplan for the plaintiff. This account was an account stated between the parties on which the plaintiff could sue. In *Siqueira* v. *Noronha* (2), Lord Atkin said (3): "But on the "other hand, there is another form of account stated which "is a very usual form as between merchants in business in "which the account stated is an account which contains "entries on both sides, and in which the parties who have "stated the account between them have agreed that the "items on one side should be set against the items upon "the other side and the balance only should be paid; the "items on the smaller side are set off and deemed to be paid "by the items on the larger side, and there is a promise for "good consideration to pay the balance arising from the fact

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(1) R. S. C. 1883, Or. 25, r. 4: "The court or a judge may order "any pleading to be struck out, "on the ground that it discloses "no reasonable cause of action or "answer, and in any such case "or in case of the action or defence "being shown by the pleadings "to be frivolous or vexatious, "the court or a judge may order "the action to be stayed or "dismissed, or judgment to be "entered accordingly, as may be "just."

(2) [1934] A. C. 332.

(3) Ibid. 337.

"that the items have been so set off and paid in the way "described." In that case it was held that there was a promise for good consideration to pay the balance on the account stated though some of the debts were barred by limitation. That case covers this and the statement of claim should not have been struck out. See also *Gugenheim* v. *Ladbroke & Co. Ld.* (1). It could turn out in this case on this statement of claim that the parties had met together and had agreed a final balance. In *Gugenheim's* case (1) it was held that the statement of claim should not be struck out and this case was not cited to Pritchard J.

[BUCKNILL L.J. I see that Tucker L.J. said in *Gugenheim's* case that he made no secret of the fact that he would have come to a different conclusion.]

In *Re Laycock* v. *Pickles* (2), Blackburn J. said (3): "There "is a real account stated called in the old law an insimul "computassent, that is to say, when several items of claim "are brought into account on either side, and, being set "against one another, a balance is struck, and the consideration "for the payment of the balance is the discharge of the items "on each side. It is then the same as if each item was paid "and a discharge given for each, and in consideration of that "discharge the balance was agreed to be due. It is not "necessary in order to make out a real account stated, that "the debts should be debts in præsenti, or that they should "be legal debts. I think equitable claims might be brought "into account and I am not certain that a moral obligation "is not sufficient." This case clearly shows that the plaintiff has a cause of action. See also *Turner* v. *Willis* (4).

Since this was a summons before the master under R. S. C., Or. 25, r. 4, the affidavit put in by the defendants was not admissible. The master must decide the issue solely on a perusal of the pleadings.

[COHEN L.J. But the affidavit was superfluous: it only set out copies of the documents referred to in the pleadings, but these documents must be deemed to have been set out in the pleadings.]

The powers conferred by R. S. C., Or. 25, r. 4, will only be exercised where the case is beyond doubt. If there are two causes of action in a statement of claim and one is

(1) [1947] 1 All E. R. 292.
(2) (1863) 4 B. & S. 497.
(3) Ibid. 506.
(4) [1905] 1 K. B. 468.

reasonable the court will not strike out the statement of claim under Ord. 25, r. 4. *Grosvenor* v. *White* (1).

[BUCKNILL L.J. But the court acting under its inherent jurisdiction can strike out part of the indorsement of writ: *Marchioness of Huntly* v. *Gaskell* (2).]

Redmond Barry K.C. and *Wingate-Saul* for the defendants. The order here was made by the master under the inherent jurisdiction of the court and the summons must be taken to have been amended. (The court now amended the summons by striking out the words "under R. S. C., Or. 25, r. 4" and adding as a further ground for the application that the statement of claim was an abuse of the process of the court.) An affidavit can be put in on a summons to strike out a statement of claim under the inherent jurisdiction of the court. *Vinson* v. *The Priory Fibres Consolidated Ld.* (3). Kekewich J. said in that case that it was not necessary to put on the summons the words "under the inherent jurisdiction of the court" as a properly drawn application would invoke the inherent jurisdiction as well as that given by Or. 25, r. 4.

The claim under para. 2 of the statement of claim was for 695*l.* won on bets, that is a claim on an agreement by way of gaming or wagering which was by s. 18 of the Gaming Act, 1845, null and void. If dealt with under R. S. C., Or. 25, r. 4, the whole pleading, therefore, must be struck out since this claim shows no cause of action, and the action is frivolous and vexatious: *Marchioness of Huntly* v. *Gaskell* (2). But apart from all rules and orders the court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous and vexatious or an abuse of its process: *Reichel* v. *Magrath* (4).

As to the claim in para. 1 of the statement of claim, that is not an account stated on which the plaintiff can sue in a court of law. It merely shows—the writ being issued in June, 1948—that in a week of the preceding February the defendants on a balance had lost bets to the plaintiff to the amount of 49*l.* odd and that this balance was to be carried forward to some other account. There is nothing to show that this document was a final statement of account between the parties; it is merely a document showing the result of one (amongst, no doubt, other) weeks' betting. If this

(1) (1890) 61 L. T. 663.
(2) [1905] 2 Ch. 656.
(3) [1906] W. N. 209.
(4) (1889) 14 App. Cas. 665.

document is an account stated, so is a mere bank pass sheet. If the customer of a bank obtained an overdraft, could he sue the bank on an earlier pass sheet as on an account stated? See the notes in Bullen and Leake's Pleadings (3rd ed.), at p. 52.

Secondly, even if this document is an account stated, it is an account stated on betting transactions only on which the plaintiff cannot sue. Farwell L.J. said in *Hyams* v. *Stuart King* (1): "No action will lie on an account stated "of which the bet or the cheque forms the foundation: such "an action is brought on an admission of a sum of money "due and is a recognized cause of action, but it does not create "a merger or destruction of the items of such account and if "such items are illegal, the action fails: *Rose* v. *Savory* (2)." In *Joseph Evans & Co., Ld.* v. *Heathcote* (3), Pickford L.J. said: "I do not think that, where a contract from its nature "can give rise to no valid claim, a claim upon it can be used to "found an action upon an account stated," and Scrutton L.J. said (4): "Thus, if there is no consideration, as in an account "stated for a barrister's fees (*Kennedy* v. *Broun* (5)), or the con-"sideration has failed or there was an immoral or illegal "consideration (*Rose* v. *Savory* (2)), or there was a statutory "condition precedent to recover which had not been fulfilled, as "the delivery of a solicitor's signed bill (*Scadding* v. *Eyles* (6)), "the claim on account stated failed." On accounts stated it was open, as Scrutton L.J. said in that case, for the court to examine the debt or consideration in respect of which they were stated. And Streatfeild J. has expressly decided that where an agreement to pay bets is void under s. 18 of the Gaming Act, 1845, an action cannot be maintained on an account stated in respect of one of those bets: *Alberg* v. *Chandler* (7).

Caplan in reply. The account in *Alberg* v. *Chandler* (7) had entries on one side only. No balance was struck after setting off entries on each side of the account. It cannot be said what the evidence will be as to consideration at the hearing and this statement of claim should not have been struck out: *Goodson* v. *Grierson* (8).

BUCKNILL L.J. I will ask Singleton L.J. to give the first judgment.

(1) [1908] 2 K. B. 696, 724.
(2) (1835) 2 Bing N. C. 145.
(3) [1918] 1 K. B. 418, 427.
(4) Ibid. 434–5.
(5) (1863) 13 C. B. (N. S.) 677.
(6) (1846) 9 Q. B. 858.
(7) (1948) 64 T. L. R. 394.
(8) [1908] 1 K. B. 761.

SINGLETON L.J. Objection appears to have been taken to the admission of affidavit evidence on a summons under Ord. 25, r. 4, it being contended, and rightly contended, that on such a summons the master could only look at the statement of claim. The master pointed out that apart from the rules of the Supreme Court he had inherent jurisdiction to strike out a pleading or part of a pleading, as an abuse of the process of the court, and in such a case affidavit evidence could be received. I am not sure that there was any necessity for the affidavit sworn by the defendant, which merely exhibited the documents referred to in the statement of claim; since if documents are referred to in a pleading they become part of the pleading and so it is open to the court to read them. The summons was not formally amended, but assuming that an amendment was necessary, I cannot see that anyone was prejudiced. There was an appeal to Pritchard J., where the matter was further considered and he upheld the decision of the master. In this court, counsel for the defendants applied, in case it should be necessary to amend the summons by striking out the words, " under the R. S. C. Or. 25, r. 4," and adding as a further ground for the application that the statement of claim was an abuse of the process of the court. That amendment was allowed, Mr. Caplan for the plaintiff not raising any objection, but reserving any questions which might arise thereon.

[His Lordship then said that para. 2 of the statement of claim was based merely on betting for February 9, 1948, at Leicester and disclosed no cause of action. This claim put forward in this way was, in his opinion, an abuse of the process of the court. He continued :]

By para. 1 of the statement of claim a claim was set up for a debt of 49*l.* 5*s.* 3*d.* " found to be due from the defendants " to the plaintiff on accounts stated and settled between " them and contained in a written account to the plaintiff " from the defendants upon their printed letter-head which " was dated February 7, 1948." That document is a bookmaker's account and it is only upon that document, the plaintiff based his claim under para. 1 of the statement of claim. It is said that this is prima facie a good claim on an account stated, and, that being so, the plaintiff is entitled to go to trial, and, further, that under Or. 25, r. 4, either the whole statement of claim must be struck out or none of it. But attention was drawn to the notes under Or. 25, r. 4, of the Annual Practice, and it is clear that under the inherent jurisdiction of the court there is power to strike out part of an indorsement on a writ, and Mr. Caplan accepted that position this morning. So that it is clear now that under the inherent jurisdiction of the court para. 2 of the statement of claim can be struck out even if para. 1 stands.

Can it be said that the document which is headed " For " the week ending 7th February, 1948," constitutes an account stated between the parties? That is the contention of the plaintiff. The document is headed " J. J. Day, Esq., in " account with William Hill (Park Lane) Limited. (D. S. 838.) " For the week ending 7th February, 1948." Then there are a number of entries which clearly are in respect of bets on either horses or dogs. At the bottom of the account there is the figure of " 49*l.* 5*s.* 3*d.*," with the letters " C. F." before it which mean, so we are informed, " carried forward." There is then a document between those parties which would appear to show that in respect of some bets in the week ending February 7, 1948, the plaintiff was in credit to the extent of 49*l.* 5*s.* 3*d.*, and that that amount was carried forward. Carried forward to what place? Apparently, to some account which may have been in credit or may have been in debit. There is nothing to show. But can it be said that this, of itself, shows the balance actually due between the parties, or that it is an account stated in the sense in which that expression is normally used? We were referred to several authorities upon this matter, and in particular to the case of *Siqueira* v. *Noronha* (1), in which case Lord Atkin, in the course of his opinion, dealt with the question of accounts stated and said (2): " But on the other hand, there is another " form of account stated which is a very usual form as between " merchants in business in which the account stated is an " account which contains entries on both sides, and in which " the parties who have stated the account between them " have agreed that the items on one side should be set against " the items upon the other side and the balance only should " be paid; the items on the smaller side are set off and " deemed to be paid by the items on the larger side, and there " is a promise for good consideration to pay the balance " arising from the fact that the items have been so set off

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(1) [1934] A. C. 332.

(2) Ibid. 337.

"and paid in the way described." Mr. Caplan submitted that this account—a bookmakers' account showing some winning bets and some losing bets—was a good account stated within these words of Lord Atkin, and referring to the case of *Gugenheim* v. *Ladbroke & Co. Ld.* (1), he relied on that case in support of his argument that in circumstances such as these the court ought not to strike out the statement of claim or order that the action be dismissed.

To come to a conclusion whether or not the weekly bookmakers' account for the week ending the February 7, 1948, was an account stated or not, it is necessary to consider just what is an account stated. I find, in Bullen and Leake's Pleadings (3rd ed.), at p. 52, these two notes: "An account stated is "an admission of a sum of money being due from the "defendant to the plaintiff, and may be charged in the above "count as a distinct cause of action." "The count lies upon "an absolute acknowledgment made by the defendant to "the plaintiff of a debt due from him to the plaintiff and "payable at the time of action brought." This bookmakers' weekly account shows the sum of 49*l.* 5*s.* 3*d.* to be carried forward to some other place. Can it be said that that is an absolute acknowledgment made by the defendants to the plaintiff of a debt due from them to him and payable at the time of action brought? I think not. There is nothing to show what was to happen to the 49*l.* 5*s.* 3*d.* under the arrangements made between the parties. The document is not an account stated in the ordinary sense, and, that being so, I am of opinion that the plaintiff's claim under para. 1 of the statement of claim is misconceived, and that when the facts are examined, no cause of action is shown. In these circumstances, it is not right that the plaintiff should be allowed to proceed with this action.

Mr. Wingate-Saul, submitted that even if the weekly bookmakers' account could be said to be an account stated, still it was an account on which an action could not succeed, having regard to the terms of s. 18 of the Gaming Act, 1845, and he referred us to certain words of Farwell L.J., in *Hyams* v. *Stuart King* (2); to what was said by Pickford and Scrutton L.JJ., in *Joseph Evans & Co. Ld.* v. *Heathcote* (3); and to *Alberg* v. *Chandler* a recent decision of Streatfeild J. (4). I do

(1) [1947] 1 All E. R. 292.

(2) [1908] 2 K. B. 696, 724.

(3) [1918] 1 K. B. 418, 427, 434–5.

(4) 64 T. L. R. 394.

not think it is necessary to go into these matters, but I am satisfied, for the reasons I have given, that this appeal ought to be dismissed.

BUCKNILL L.J. I agree. The question which we have to decide is whether this is an action which is frivolous or vexatious or an abuse of the process of the court. Mr. Caplan, in his courageous and careful argument, referred us to the case of *Goodson* v. *Grierson* (1). That was a case in the Court of Appeal, and it was an action commenced by a bookmaker issuing a specially indorsed writ for the sum alleged to be due on a stated account. The defendant pleaded in his defence that the debts were gambling debts. The plaintiff admitted that, but set up in his reply other considerations, namely, the plaintiff's forbearance to sue and his giving time to the defendant, at the latter's request. The defendant then applied to have the action dismissed as frivolous and vexatious. The master and the judge dismissed the action, but the Court of Appeal reversed the decision, and Fletcher Moulton L.J. said (2): " In order to support an application of this kind the " defendant has to show that under no possibility could there " be a good cause of action consistently with the pleadings " and the facts in the case. But in this case counsel for the " defendant is obliged to admit that there are cases where it " has been held that, having regard to the serious social " consequences which would ensue from an unsatisfied demand " for a debt of this kind, there may be good consideration in " such forbearance." When one is considering whether an action is frivolous and vexatious one can, and must, look at the pleadings and nothing else. The court cannot assume that possibly, when the case comes to trial, the plaintiff may be able to put forward some other and better reason for succeeding. One must look at the pleadings as they stand. Prima facie these transactions are betting transactions pure and simple, and, therefore, are irrecoverable under the Gaming Act, 1845. The plaintiff seeks to avoid that difficulty in his way by alleging that this document for the week ending February 7, 1948, is an account stated. There is a statement in the letter of December 8, 1947, from the defendants to the plaintiff, under which the plaintiff started to bet with the defendants, that he was a depositor of 25*l*., and the letter continued:

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(1) [1908] 1 K. B. 761.

(2) Ibid. 764.

"A statement of account will be rendered to you each week "and a cheque enclosed for any amount over and above "your deposit." This so-called account rendered is merely a weekly statement made in accordance with the terms of that letter, and I notice, amongst other things, that if it is said to be a complete statement of account, there is no reference to the 25*l*. which has been deposited. The letters "C. F." indicate "carried forward," as Singleton L.J. has pointed out, and obviously refer to a carry forward to the next week, but I think, from the fact that the total claim on the writ is slightly more than the amount claimed on the statement of claim, that there were some further transactions after that week ending on February 7. Mr. Caplan was, I think, compelled to admit that if the plaintiff had made one bet and one bet only in respect of any particular week, and had received a weekly account showing that he had won (say) 100*l*. on that bet, that could not be said to be an account stated on which an action would lie. On the other hand, if he made two bets, and he won on the first bet and lost on the second, and the weekly account showed that there was a balance due to him that that would be an account stated, and he could recover that. If that were the state of the law, the result would be to render s. 18 of the Gaming Act, 1845, ineffective. I think this is an attempt to circumvent that Act, and it ought not to succeed, and that the order of the learned judge was right.

Appeal dismissed.

Solicitors for the plaintiff: *William Foux & Co.*
Solicitors for the defendants: *Hardcastle Sanders & Co.*

C. G. M.

BILLINGHAM *v.* HUGHES AND ANOTHER.

C. A.
1949
Feb. 16, 17
Mar. 10.
Tucker and Singleton L.JJ. and Birkett J.

Personal injuries—Negligence—Assessment of Damages—Loss of professional earnings—Income tax—Whether to be considered in assessing loss—Restitutio in integrum.

The plaintiff, a doctor and radiologist, fifty-one years of age, was knocked down and seriously injured by an army vehicle negligently driven by the first defendant, Hughes. As a result

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of his injuries the plaintiff was unable to continue his activities as a general practitioner, but it was contended that as a skilled radiologist he would be able to extend his practice in that branch of his profession and for that purpose would have more time at his disposal. On the basis that the plaintiff's total earnings had amounted to 2,000*l*. a year the trial judge awarded him 20,000*l*. damages for loss of future earnings, i.e., 2,000*l*. for fifteen years, less one-third of the resultant sum for contingencies, and in consideration of the facts that the plaintiff would receive a large capital sum and might possibly increase his earnings as a radiologist. On appeal by the defendants, on the grounds that the award was excessive and in particular that the trial judge should have based his award on the plaintiff's earnings less income tax and not on his gross earnings:—

Held, that the award of 20,000*l*. was excessive, having regard to the fact that the plaintiff would have more time to devote to increasing his earnings as a radiologist, and should be reduced to 10,000*l*.

Held, further, that the principle of restitutio in integrum required that the plaintiff should be put in the position in which, but for the accident, he would have been vis à vis his patients, i.e., to receive his fees in full, and that the question of his ultimate liability to the Inland Revenue was a matter which did not concern the wrongdoers.

Decisions in *Fairholme* v. *Firth and John Brown Ld.* (1933) 49 T. L. R. 470; and *Jordan* v. *Limmer and Trinidad Lake Asphalt Co. Ld.* [1946] K. B. 356 approved.

APPEAL from Croom-Johnson J.

The plaintiff, a doctor and radiologist, aged fifty-one, who with a partner carried on an extensive practice in and around Great Waltham, near Chelmsford, was on November 28, 1947, knocked down and seriously injured by an army vehicle driven by the first defendant, Hughes. The plaintiff sustained, among other injuries, a fracture of the pelvis, a fracture of the external tuberosity of the right tibia, with sprain of the internal lateral ligament of the knee joint, and contusion of the abdominal muscles, causing aggravation of a pre-existing inguinal hernia. He made a good recovery but the injury to the right tibia and knee joint, though not in itself of major severity, occurred at the seat of an extremely severe arthritis, produced by an old war injury of 1916, with the result that it now constituted a permanent and substantial disability, rendering the plaintiff physically incapable of carrying out the arduous duties of a general practitioner. He had accordingly been compelled to give up that part of his practice. In July, 1948, Croom-Johnson J. found the defendant Hughes wholly to blame for the accident, and he assessed the damages at 24,000*l.*, namely, 4,000*l.* for pain and suffering and loss of amenities, etc., and 20,000*l.* in respect of loss of future professional earnings. In assessing the latter figure the learned judge took the plaintiff's loss of earnings from the partnership at roughly 2,000*l.* a year, and reckoning the remainder of his working life at fifteen years, he discounted one-third of the resultant figure of 30,000*l.* in order to allow for contingencies, for the fact that he would be receiving a large capital sum down, and for a possible increase in the plaintiff's earnings as a radiologist, to which branch of his profession he would be able to devote his whole time.

The defendants appealed, on the grounds that the award of 20,000*l.* was in the circumstances excessive, and in particular that the award was based on the plaintiff's gross earnings, without deduction for income tax.

Berryman K.C. and Eric Blain for defendants. The principle to be applied in assessing damages for loss of future earnings is restitutio in integrum. A distinction is to be drawn between damages for breach of contract and damages for loss of earnings due to a tort. In dealing with a specific contract you cannot call in aid something outside the contract to detract from the damages, but in assessing the damages for loss of earnings if the income tax payable on the claimant's earnings is not taken into consideration the claimant may be put into a position in which he is nearly twice as well off as he would have been in if he had continued to earn his livelihood. In *Fairholme* v. *Firth and John Brown Ld.* (1), in 1933, du Parcq J. held that income tax could not be taken into consideration, and in *Jordan* v. *Limmer and Trinidad Lake Asphalt Co. Ld.* (2), a P.A.Y.E. case, Atkinson J. also held that no account must be taken of the income tax deducted from the claimant's weekly wage in assessing damages. In the Scottish case of *M'Daid* v. *Clyde Navigation Trust* (3), Lord Sorn took the opposite view. In the two English cases, it is submitted, too much attention was paid to the principle of res inter alios acta. In order to arrive at what the injured man has actually lost, the tax which would have had to be paid on his earnings, but which will not be deducted from the lump sum awarded, must be taken into consideration. The principle of res inter alios acta does not apply in this case. The learned judge was wrong in assessing damages on the basis of a continuing income of 2,000*l.* for fifteen years, and in not taking into account the liability for income tax. In any event the award of 20,000*l.* is so excessive that this court is entitled to reduce it.

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(1) (1933) 49 T. L. R. 470.
(2) [1946] K. B. 356.
(3) 1946 S. C. 462.

Tristram Beresford K.C. and George Pollock for plaintiff. It is submitted that the point now taken, that there should have been consideration of the incidence of taxation in assessing the damages, was not raised in the court below and cannot now be taken. It would be ludicrous to embark on such an inquiry without any evidence as to what allowances and deductions would have to be made from the gross income before the assessment of tax. There was no evidence that the trial judge had proceeded on any wrong principle. The accountant's figures showed that the plaintiff's practice was an ever-increasing one, and that fact was taken into account by the learned judge, as well as the depreciated value of the pound, and other contingencies. An inquiry into income tax would be entirely a matter between the plaintiff and a third party, it would be very prolonged, and on the principle of expediency the courts would not embark on it. Moreover it could not be assumed that the plaintiff would necessarily have continued to practice in a country where income tax of 9*s.* in the pound was payable.

Cur. adv. vult.

March 10. TUCKER L.J. This is an appeal by the defendants from a judgment of Croom-Johnson J., in which he awarded the plaintiff the sum of 24,000*l.* by way of damages for personal injuries caused by the negligence of the first defendant. Negligence is not now in issue and this appeal relates only to the damages, which the defendants contend are so excessive as to warrant interference by this court according to the principles governing this matter, which are so well known that they do not require repetition.

The evidence as to the plaintiff's professional earnings showed that in the previous three years his average income from the general practice had been 1,900*l.* The plaintiff's partner did not assist in the radiology work, but the fees therefrom formed part of the profits of the partnership. Over the previous three years, the total radiology fees had averaged 800*l*. and in the last year had amounted to 1,286*l*., earned in from 15—20 hours a week devoted to this branch of his work. They were derived from two appointments which he held at local hospitals. He will now be at liberty to devote the whole of his working time to this specialized branch, and, moreover, will not have to share these fees with his partner, so that although the loss on the general practice would on these figures amount to about 2,000*l*., there would be a gain of some 400*l*. or thereabouts in the radiology fees. But it appears that there is every prospect of an appreciable increase from this source. Even if the X-ray work at these two hospitals is not sufficient to occupy him for more than 15—20 hours a week, it would seem that other similar appointments may be obtained, and it is always open to him to set up as a radiologist on his own account. I cannot think that in assessing his loss of earnings at 20,000*l*. the learned judge can have given sufficient weight to this important factor, coupled with the pre-existing serious arthritic condition of the knee, which might in any event have necessitated premature retirement from general practice. This is not the case of a professional man earning large fees who has been put out of practice for the remainder of his life. Fortunately, he is still able to carry on a highly skilled specialized branch of his work, at which he had earned 1,200*l*. in the last year, and to which he can now devote his full time. It is, of course, a grievous blow to have to give up his general practice, and it will in all probability, at any rate at first, seriously affect his earnings, but, none the less, I think the figure of 20,000*l*. is so greatly in excess of a proper estimate of his loss that I would reduce it to 10,000*l*., which, with the sum of 4,000*l*. attributable to the other matters referred to above, would reduce the total sum to 14,000*l*., subject to a further consideration with which I will now deal.

It is contended on behalf of the defendants that the sum ultimately arrived at should reflect the fact that it is not subject to income tax or surtax, whereas the fees which the plaintiff would have received would have been reduced by the incidence of these taxes. It is, I think, significant that although income tax rose to 5*s*. in the pound in the year 1916/17 and has never since gone below 4*s*., this point has never been raised in any reported case in this country until 1933, when it was rejected by du Parcq J. in *Fairholme* v. *Thomas Firth and John Brown Ld.* (1). After an interval of thirteen years and with the introduction of P.A.Y.E., it was again raised before Atkinson J. in *Jordan* v. *Limmer & Trinidad Lake Asphalt Co. Ld.* (2), and met a similar fate. Neither of these cases was taken to this court, and we are accordingly called upon to deal with the question for the first time. *Fairholme's* case (1) was a claim for damages for wrongful dismissal, but I can see no distinction in principle between that case and the present. It can no doubt be said in a case of damages for wrongful dismissal that it is difficult to see why the party who has broken his contract should benefit from his breach by paying less by way of damages than if he had paid the salary due under his agreement with the plaintiff, but considerations of this kind are irrelevant to the only question involved in the assessment of damages, whether for breach of contract or tort, namely: what is the sum required so far as possible financially to effect restitutio in integrum? Where, therefore, loss of salary or earnings is the basis of the claim for damages, whether for breach of contract or in tort, the same considerations must apply.

In the present case, but for the plaintiff's accident, he would have earned *xl.* in fees in any year ending April 5. On January 1 in the following year, a sum would become due to the Inland Revenue in respect of those fees, which sooner or later would presumably be paid. In the next year, these fees would affect the incidence of surtax. In the meanwhile, the plaintiff would have had the use of this money; it would have belonged to him. His patients could have been sued if they did not pay, and he would have recovered against them judgment in full without any deduction in respect of income tax. On what principle, then, can the defendants, who have rendered the earning of these fees impossible, be heard to say that the loss should be estimated not at the sum which the plaintiff would have received from his patients, but at a lower figure, based on an estimate of tax which he would have been called upon to pay at some future date? It seems to me, apart from authority, and apart from the practice which has prevailed for so many years, that restitutio in integrum requires the plaintiff to be put in the position in which he

(1) 49 T. L. R. 470.

(2) [1946] K. B. 356.

would have been vis à vis his patients, that is, to receive his fees in full, and that questions of his ultimate liability to the Inland Revenue are matters which do not concern the defendants. It is possible that different considerations might arise in cases of P.A.Y.E., such as that before Atkinson J. in *Jordan* v. *Limmer & Trinidad Lake Asphalt Co.* (1), where the plaintiff never would have received his wages in full, but I am not to be taken as casting any doubt on the correctness of the decision of that learned judge in the case referred to.

We have been referred to two cases in Scotland. In one of them, namely *M'Daid* v. *Trustees of Clyde Navigation* (2), Lord Sorn decided that the incidence of income tax should be taken into consideration in the assessment of damages, and in the other, namely *Blackwood* v. *Andre* (3), Lord Keith took the contrary view, and refused to follow the decision of Lord Sorn. In my view the two English cases were rightly decided. It seems to me that the fallacy, if I may respectfully say so, of the contrary view is that it proceeds on the basis that the court can inquire into what happens to the money after it has become the income of the recipient. Where tax is deductible at source, it is true that that part of the income is only notional income, but where, as in this case, the money would have been received free from deduction, the gross sum would have become in law and in fact part of the plaintiff's income.

For these reasons, I would make no further deduction from the sum of 14,000*l.* I would, for the reasons previously stated, allow this appeal and substitute the sum of 14,000*l.* for the sum of 24,000*l.* awarded by the learned judge.

SINGLETON L.J. The assessment of damages by the learned judge really falls into two parts. He assessed the sum payable in respect of future loss of professional earnings from the partnership at 20,000*l.*, and he added the sum of 4,000*l.* for the loss of amenities, pain and suffering, and physical disability, and this figure of 4,000*l.* included the out-of-pocket loss up to the date of trial, which was agreed at 911*l.* 12*s.* 4½*d.* The attack upon the judgment was directed against the amount of 20,000*l.* awarded in respect of loss of earnings in the future. It was claimed that it was too high in any event, and, further,

(1) [1946] K. B. 356.
(2) 1946 S. C. 462.
(3) 1947 S. C. 333.

that no regard had been paid to the tax which Dr. Billingham would have had to pay had he continued in general practice, earning 2,000*l.* a year from his share of it.

The assessment of damages is one of the most difficult tasks that face a judge of first instance. After full and careful consideration, I have reached the conclusion that the sum of 20,000*l.* is much too high. The judge rather assumed that the doctor could make 2,000*l* .a year for fifteen years, that is 30,000*l.*, and reduced that figure to 20,000*l.* for reasons which he gave. Having regard to all the facts, and in particular, to the opportunity of increased earnings on the radiology side, in my view the damages on this head should be reduced to the sum of 10,000*l.* It is now clear that Dr. Billingham's loss is not so much as 2,000*l.* a year, as he receives the whole of the fees received from his work as a radiologist, whereas before his accident the fees so received were shared between him and his partner. In 1945, those fees were 591*l.*, in 1946 575*l.*, and in 1947 the fees received increased to 1,286*l.* Of course, Dr. Billingham would have more time to give to this work, and consequently the opportunity of earning more from it, after he gave up general medical practice.

When the case was before the court of first instance, no argument was put forward to the effect that the judge, in assessing damages, must have regard to the fact that the plaintiff would have had to pay income tax on his yearly earnings. Indeed, the figures agreed as out-of-pocket loss included a sum for loss of earnings without any such deduction. Before this court, Mr. Berryman submitted that the incidence of income tax, and surtax in a case to which it applied, ought to be remembered in any such assessment. It is right to say that in arriving at a sum of damages in respect of loss of future earnings, the court must make the best estimate it can of future loss. If the basis of calculation is 2,000*l.* a year, and income tax is 9*s.* in the pound, it is obvious that a plaintiff may recover on this head more than his actual pecuniary loss. Equally, it can be said that if a wrongdoer can claim the benefit of a high rate of tax, or of the fact that a plaintiff was a surtax payer, he escapes some portion of his liability because of the financial position of the injured party. It is difficult to see why he should be allowed to do so.

It is surprising that this question has not come up for consideration in the Court of Appeal until now ; it is of great

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importance. Atkinson J. had to consider a similar point in *Jordan* v. *The Limmer and Trinidad Lake Asphalt Co.* (1), and he decided: " Where a plaintiff in an action for damages " for personal injuries claims, as an item of special damage, " the amount of wages lost owing to his incapacity for work, " in assessing the sum to which he is entitled no regard must " be paid to the fact that a weekly sum for income tax is " deducted from his wages, and the sum awarded must be the " full rate of wages for which provision is made by the terms " of his contract of employment." In so deciding, the learned judge followed the decision of du Parcq J. in a wrongful dismissal claim, *Fairholme* v. *Thomas Firth and John Brown Ld.* (2), and he pointed out that " it may be that the Inland " Revenue Authorities may consider that they are entitled " to make an assessment on a plaintiff who has recovered " damages which include loss of wages, but that is a matter " for them." That was an instance of wages actually lost before the date of trial. In the argument before this court, it was assumed that the sum of 20,000*l*., being an award of general damages, was not subject to a claim for income tax. In a case in which the out-of-pocket loss of an injured plaintiff is assessed or agreed, and the sum includes an amount of x*l*. for loss of earnings for a period up to the date of trial, I see no sound reason why the Revenue should not have a claim to tax upon that amount. It is money which the plaintiff would have earned had he not been prevented from working; it is paid by the wrongdoer instead of by the employer; there is no difficulty in arriving at the amount—it is generally agreed. If the plaintiff keeps the whole of it, he is financially in a better position than he would have been if he had continued to work, in which case his earnings would have been subject to tax. True, it is awarded as part of a sum of general damages, and in such a case income tax is not usually chargeable (see *Commissioners of Inland Revenue* v. *Ballantine* (3), and also *Commissioners of Inland Revenue* v. *Barnato* (4)). The question of damages in respect of the loss of future earnings is much more difficult. I am content to assume that in neither case can income tax be recovered from a successful plaintiff in such a case. Whether some alteration in the law is desirable is not a matter for this court.

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(1) [1946] K. B. 356.
(2) 49 T. L. R. 470.
(3) 8 Tax Cas. 595.
(4) 20 Tax Cas. 455.

It is not without interest to observe that the defendants agreed the out-of-pocket loss and only raised the question they raise in this appeal when they came to this court, and of course, they do not seek to go behind their agreement on the loss of earnings up to the date of trial. Towards the end of his judgment in *Jordan's* case (1), Atkinson J. said: "Therefore, although the argument that the plaintiff will "be getting more, if no deduction is made, than he would "have got if he had not been injured, is, as I have said, an "attractive one, I think the practice of ignoring this result "is now too well established for a judge of first instance, "at any rate, to interfere with it."

Some three months before the decision of Atkinson J., the question had arisen in Scotland in *M'Daid* v. *Trustees of the Clyde Navigation* (2). The report of that case was not before Atkinson J. In that case Lord Sorn held that: "Where "loss of earnings became a factor in assessing an award of "damages to a pursuer, if these earnings would have been "liable to taxation that fact must be taken into consideration "and some deduction must be made in respect of this liability." There is much in the reasoning of Lord Sorn which appeals to me. If the assessment of damages is based on the gross loss of earnings of an injured person (and if no portion of the sum awarded is subject to income tax) it seems to me that the assessment is not based on the pecuniary loss sustained; in other words, if the calculation was precisely accurate arithmetically, a plaintiff would recover more than his pecuniary loss. The question again came up for consideration in Scotland in the case of *Blackwood* v. *Andre* (3), when Lord Keith expressed a directly opposite view to that of Lord Sorn, holding that, in assessing the damages due to an injured pursuer, the court has no concern with the incidence of taxation, and, where loss of earnings is a factor in the assessment, no deduction can be made on the ground that these earnings would have been liable to tax.

Though the principle has always been to seek to arrive at the pecuniary loss of the individual, the practice in the courts of this country has consistently been not to have regard to income tax in the assessment of damages; and to alter the practice now would lead to great confusion, and would add immeasurably to the difficulty of assessing damages

(1) [1946] K. B. 356.
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and in the direction to be given to a jury. Consider the cases of four different men each earning 2,000*l*. a year. A. has no other income but has a wife and young children. B. is a bachelor with an investment income of 2,000*l*. a year. C. has a farm on which he makes a loss of 500*l*. a year which can be set off against his other income for tax purposes. D. by covenant or otherwise has disposed of half his income. If each of those four men is injured and away from work for a year, is the assessment of pecuniary loss to be on a different basis in each case because the amount of tax payable by each on his earned income differs? A man's income is his own and he can do with it what he likes. Income tax is a charge on the person, and not on property or gains; it is to be charged in respect of all property, profits or gains (s. 1 of the Income Tax Act, 1918) and under sched. D. tax is to be charged in respect of the gains to any person from employment or vocation.

No question arises in this case under the regulations made under the P.A.Y.E. system, and their effect was not fully argued, but I think it is right to say that I do not see that they have changed the basic position. Income tax remains a charge on the person, and not on his profits or gains from his employment, or on his property. In my opinion, the claim of the defendants that tax should be taken into consideration in assessing damages should be rejected. I do not think that this court ought to alter what has been the recognized practice for so long. It is for the Revenue authorities to consider whether the law as it stands meets such cases.

I am in favour of allowing the appeal to the extent of reducing the damages to the sum of 14,000*l*.

BIRKETT J. The only question in this appeal was whether the damages of 24,000*l*. awarded to the plaintiff by Croom-Johnson J. were such that good reasons existed for reducing them. There was no doubt that the plaintiff had been gravely injured through the negligence of the defendant Hughes when driving an army vehicle on November 28, 1947, and that in consequence of these injuries he had been permanently disabled. The effect of this disablement had made it impossible for the plaintiff, who was a doctor, to carry on his general practice, although he was able to continue his work as a radiologist. The conclusion to which I have come is that when all the factors are considered, and particularly the fact that the plaintiff, happily, has ready to his hand the lucrative work of a radiologist, to which he can devote the whole of his time, and from which his earnings may quite reasonably be expected to increase greatly beyond his past earnings, the amount of 20,000*l.* is much too high and ought to be reduced. I would myself allow the 4,000*l.* awarded by the learned judge in respect of pain and suffering and loss of amenities to stand; but I would reduce the sum of 20,000*l.* to the sum of 10,000*l.*, and make the judgment 14,000*l.* instead of 24,000*l.*

Apart from the general submission on behalf of the defendants that the sum of 24,000*l.* awarded by the learned judge was excessive, a further submission was made that the damages awarded to the plaintiff, whatever their amount, should be calculated, so far as the loss of future earnings was concerned, by deducting some amount to represent the taxation which would have been imposed on the plaintiff's earnings had he continued his practice from year to year. In my opinion, the answer to this submission is that when assessing the damages of an injured taxpayer, the court has no concern with the incidence of taxation. It is a little extraordinary, and perhaps a little illuminating, to observe that in all the years that judges and juries have been assessing damages for loss of earnings and earning capacity, only four cases have come before the courts when the point was expressly raised, two in England and two in Scotland. In *Fairholme* v. *Firth and John Brown Ld.* (1), du Parcq J. said: "In assessing the "damages the suggested deduction ought not to be made"; the true view he took to be that it was the employers' duty to pay the salary agreed. The employee was under a duty to the Crown to pay the tax on his income, including his salary. The incidence and extent of the tax were matters between the Crown and the employee; they were no concern of the employer. In *Jordan* v. *Limmer and Trinidad Lake Asphalt Co. Ld.* (2), Atkinson J. adopted the view taken by du Parcq J. The English decisions therefore are both one way. In Scotland in *M'Daid* v. *Clyde Navigation Trustees* (3), the Lord Ordinary, Lord Sorn, held that the tax should be deducted when assessing damages, although it was

(1) 49 T. L. R. 470.
(2) [1946] K. B. 356.
(3) 1946 S. C. 462.

recognized in the judgment that very great practical difficulties would occur in so doing; but in the later case of *Blackwood* v. *Andre* (1), the Lord Ordinary, Lord Keith, expressly disagreed with the decision of Lord Sorn and refused to follow it.

For my part, I think the essence of the decision lies in the words of Lord Keith when he said: "The court in my "opinion has no concern with the incidence of taxation when "assessing the damages of an injured taxpayer," and I am content to say that I am of the same opinion. If it were otherwise, and in all cases of this nature the court had to concern itself with the incidence of taxation when assessing damages, great difficulties and as I think considerable injustice would arise. In many cases the court would be without the material on which to form a considered view, and without the means of compelling the material to be produced. In the present case, if the plaintiff had not been injured and disabled, he would have continued to earn fees from his general practice, and they would have been paid to him, of course, without any deduction of tax and without reference to tax of any kind. The question of taxation would only arise when the fees had been paid, and when the plaintiff had brought into account any other sources of income, and had settled the allowances to which he was entitled. The amount of tax he might have to pay might differ from year to year; but with all these things the defendants certainly have nothing to do, and are equally certainly not entitled to say that, as wrongdoers, they should receive an abatement of the damages they ought to pay by deducting tax, solely for their benefit. The State would certainly lose, and the measure of the State's loss would be the measure of the defendants' gain.

The plaintiff, in common with all other plaintiffs in the like case, is entitled to restitution, as far as it can be achieved, for the loss which he has sustained as the result of the injury he has suffered at the hands of the defendants. The loss which he has suffered is the power to earn fees from his patients in his general practice, and his right to receive those fees from his patients without deduction of any kind. In my opinion the defendants are liable to the plaintiff for the loss of the gross earnings he would have received but for their

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(1) 1947 S. C. 333.

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negligence; and they are not entitled to say that the damages they must pay ought to be reduced by the deduction of tax.

I would allow this appeal, and reduce the damages to 14,000*l*.

Appeal allowed.

Solicitors for plaintiff: *Patersons, Snow & Co. for Gepp & Sons, Chelmsford.*

Solicitor for defendants: *The Treasury Solicitor.*

A. W. G.

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Jan. 20, 21.

Lord Goddard C.J., Humphreys and Finnemore JJ.

BEESTON AND STAPLEFORD URBAN DISTRICT COUNCIL AND ANOTHER *v.* SMITH.

Solicitors—Clerk to local authority not solicitor or having other prescribed qualifications—Authority's advances on small dwellings—Mortgage deeds prepared by clerk on instructions from authority—Charges made to mortgagors passed to general rate fund—" Fee, gain or " reward "—" Public officer "—Authority and clerk charged with offence—Small Dwellings (Acquisition) Act, 1899 (62 & 63 *Vict., c.* 44)—*Solicitors Act,* 1932 (22 & 23 *Geo.* 5, *c.* 37), *s.* 47, *sub-s.* 1, *as amended by Solicitors Act,* 1941 (4 & 5 *Geo.* 6, *c.* 46), *s.* 23, *sub-s.* 1.

By s. 47, sub-s. 1, of the Solicitors Act, 1932, as amended by s. 23, sub-s. 1, of the Solicitors Act, 1941, an offence is committed by any person without the prescribed qualifications, in particular if he is not a barrister or a solicitor, " who, unless he proves that " the act was not done for . . . . any fee, gain or reward . . . . draws or prepares any instrument relating to real or personal " estate"; but by s. 47, sub-s. 3, the section does not extend to " (*a*) any public officer drawing or preparing instruments in the " course of his duty."

If a local authority make an advance under the Small Dwellings (Acquisition) Act, 1899, and then by their clerk charge the mortgagor with the cost of preparing the necessary mortgage instrument and of making the prescribed investigation of title, both they and the clerk act for fee, gain or reward within the meaning of s. 47, sub-s. 1; and they do so none the less because the sums paid by the mortgagor by way of costs are passed to the general rate fund of the authority. Moreover, the clerk cannot claim the benefits of the exception made by s. 47, sub-s. 3, because the expression " public officer " in sub-s. 3 (*a*) refers to an officer of a public department, whose salary is chargeable to national and not to local funds, and does not, therefore, include the clerk to a local authority.

Accordingly, where a local authority making advances under the Act of 1899 instructed their clerk, who was not a solicitor or otherwise qualified as required by s. 47, sub-s. 1, of the Act of 1932, to make the necessary investigations of title and to draw the necessary mortgage deeds, the mortgagors being required to pay the costs of those services and the sums so paid by them being credited to the general rate fund :—

Held, that the authority and the clerk were guilty of contravening s. 47, sub-s. 1 of the Act of 1932 by respectively preparing and drawing those instruments.

In re Mirams [1891] 1 Q. B. 594 applied.

CASE STATED by Nottingham justices.

At a court of summary jurisdiction sitting at Nottingham informations were preferred by the respondent, Robert James Tull Smith, a solicitor, on behalf of the Law Society under s. 47 of the Solicitors Act, 1932, as amended by s. 23 of the Solicitors Act, 1941, against the appellants, Beeston and Stapleford Urban District Council, alleging that they on various dates in 1947, not being a barrister or duly certificated solicitor, law agent, writer to the signet, notary public, conveyancer, special pleader or draftsman in equity, either directly or indirectly did for fees, gain, or reward prepare certain instruments relating to four mortgages. Informations were also preferred against the appellant, Charles Harold Wragg, the clerk of the council, for drawing the four instruments in question.

On the hearing of the informations the following facts were proved or admitted : the clerk to the urban district council was in receipt of a salary of 740*l.* a year, which was fixed by resolution of the council in June, 1946, and had not been varied since. The council had passed a resolution undertaking to act under the Small Dwellings Acquisition Act, 1899, as amended, in pursuance of s. 9 of that Act. By s. 2 the council had to be satisfied, before making an advance under the Act, that the title to the property was one which an ordinary mortgagee would be willing to accept, and that the repayment to the council of the advance was secured by an instrument vesting the ownership of the property in the council, subject to the right of redemption.

Until 1946 investigation of title and the preparation of mortgage instruments were undertaken by a firm of solicitors instructed by the council. Those solicitors rendered a bill of costs for the work to the borrower, and they charged in accordance with a scale of legal charges which they drew up.

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In December, 1946, it was reported to the council by their chief financial officer that they were losing money on each advance. Accordingly they decided by resolution to discontinue the practice of instructing solicitors to undertake the work of investigating title and preparing mortgage instruments. The council decided that thenceforward the work should be done by the clerk and a charge be made to borrowers according to the "scale of legal charges" originally drawn up by the solicitors instructed by the council.

In April, 1947, four residents in the council's area each wished to borrow a certain sum in respect of a house. In each case the mortgage was prepared by the clerk and a bill of costs was sent to the borrower, which he duly paid. The amount charged to a mortgagor by the council approximated to the charge made to the mortgagor when solicitors were instructed to do the work of investigating title and preparing mortgage instruments, and also approximated to the charge made by building societies when making advances. Any charges paid by a mortgagor to the council were credited to the council's general rate fund.

For the council and their clerk it was contended, as regards the clerk, that in respect of the four transactions he had not acted for or in expectation of fee, gain or reward; that he had satisfactorily established that fact so as to come within the exception in s. 47, sub-s. 1, of the Act of 1932 as amended; that he was a "public officer" drawing or preparing instruments in the course of his duty within the meaning of s. 47, sub-s. 3 (*a*), of the Act of 1932, so that s. 47 did not extend to him; that he was acting as a servant of the council and was not personally liable; that the duties imposed under the Act of 1899 upon the council involved considerable cost, the payment of which should, in fairness to the general body of ratepayers, be borne by the borrowers as persons securing benefits under that Act; that to hold that all expenses, including stamp duty and the cost of preparing the mortgage deed, should be paid out of the rate fund would mean that the council would contravene s. 9, sub-s. 4, of the Act of 1899 and would be debarred from making further advances under that Act for five years; and that in making charges the council were not acting ultra vires.

It was contended as regards the council that they had not acted for fee, gain or reward, and had satisfactorily established that fact so as to come within the exception in s. 47, sub-s. 1, of the Act of 1932 as amended; and (mutatis mutandis) that the other points put forward in support of the case for the clerk also applied to them.

It was contended for the prosecutor, as regards the clerk, that he was acting for fee, gain or reward, and that the fact that sums charged were paid to the council, or that such sums only covered expenses, did not make the charge any other than a fee, gain or reward; that, while there was no definition in the Act of 1932 of "public officer," the term had been interpreted in a number of cases under other Acts, and that, on balance of authority, the clerk here could not be said to be a "public officer" since he had not the attributes in those cases indicated as necessary; that by s. 9, sub-s. 3, of the Small Dwellings Acquisition Act, 1899 (repealed by the Local Government Act, 1933, but, in the submission of the prosecutor, re-enacted by s. 188 of that Act) all liabilities falling to be discharged by the council should be discharged out of the general rate fund; that, as the expenses for which the council sought to recoup themselves were expenses incurred while fulfilling their duties under the Act of 1899, those expenses should be discharged out of the general rate fund, and not by charging the borrower; that, as there was no power to charge the mortgagor, the clerk was acting ultra vires and could not be acting in the course of his duties even if he were a public officer; and that he therefore could not claim the protection of the exception in s. 47, sub-s. 1, of the Act of 1932.

As regards the council, it was contended that they could only act by their servant the clerk; that (mutatis mutandis) the arguments advanced against the clerk also applied against them; that the clerk was guilty of drawing four instruments relating to real estate for reward; and that the council were guilty of preparing four instruments relating to real estate for reward.

The justices were of opinion that the Local Government Act, 1933, while repealing s. 9, sub-s. 3, of the Small Dwellings Acquisition Act, 1899, enacted that all liabilities falling to be discharged by the council should be discharged out of the general rate fund, and, further, that all charges arising in connexion with the drawing or preparing of mortgage deeds in relation to advances under the Small Dwellings Acquisition Act should be met by the council and not by the borrower. Accordingly the council and their clerk were

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purporting to do something which they were not legally entitled to do, and were acting ultra vires. The justices held, secondly, that the council and their clerk did respectively prepare and draw instruments relating to real estate for fee, gain or reward, and did commit offences against the Solicitors Act, 1932, as amended. They further held that if they were wrong on the first matter, then the clerk was a public officer drawing instruments relating to real estate in the course of his duty; and but for the above holding they would have dismissed the summonses. The council and their clerk appealed.

Fitzgerald K.C. and *Cotes-Preedy* for the clerk and the urban district council. The two questions in the case are (1.) whether the council and their clerk were acting in expectation of a fee or reward; and (2.) whether the clerk is a "public officer."

The fee contemplated must be a personal fee payable to the council or to the clerk. Here there was no such thing. There was merely a payment by the mortgagor which was passed to the council's general rate fund.

[LORD GODDARD C.J. The council make a charge, therefore the preparation and drawing of the deed cannot be gratuitous. The council may pay the fee into the rate fund, but that is in fact their banking account. The real question is whether the clerk is a "public officer."]

It is submitted that he is: in *Lyme Regis Corporation* v. *Henley* (1) a local authority were in effect held to be public officers for the execution of their duties of repair and maintenance under a Royal Charter. In *Rex* v. *Whitaker* (2) the colonel of a regiment was held to be a public officer for the purposes of the common-law misdemeanor of accepting a bribe as an inducement to show favour. In *Castle Steam Trawlers, Ld.* v. *Great Western Rly. Co.* (3) the words "interests "of the public" in s. 27, sub-s. 2, of the Railway and Canal Traffic Act, 1888, were held to include the interests of any considerable portion of the population. These authorities would appear to make it clear that the clerk of a local authority is a public officer within the meaning of s. 47, sub-s. 3, of the Act of 1932. *In re Mirams* (4) seems clearly distinguishable: the chaplain to a workhouse and workhouse infirmary was there held not to be a public officer; but the position of such a person differs widely from that of the clerk to a local authority.

(1) (1834) 2 Cl. & F. 331.

(2) [1914] 3 K. B. 1283.

(3) (1908) 24 T. L. R. 317.

(4) [1891] 1 Q. B. 594.

Paull K.C. and *Cumming-Bruce* for the prosecutor. In support of these convictions under s. 47 of the Act of 1932 no reliance is placed on the proposition that the council acted ultra vires in collecting a fee from the mortgagor. It is conceded that that ground for the justices' decision was wrong. Neither the council nor their clerk, however, was a public officer. The council are an independent authority; they are not an officer or agent, public or otherwise, and the exception in s. 47, sub-s. 3 (*a*), cannot apply to them. The clerk is an officer but not a public officer. The term " public officer " is given a narrow meaning in s. 4, sub-s. 2, of the Solicitors Act, 1933, and is intended to be distinguished from county officers and officers of a local authority, whose position is provided for separately in ss. 5 and 6 of that Act. This Act is to be read with the principal Act of 1932 and gives a strong indication that " public officer " throughout the Solicitors Acts is intended to carry a restricted meaning. If it had been the intention to empower all unqualified officials of local authorities to undertake conveyancing, with its complexity and far-reaching effects upon public and private rights, express words would have been used in s. 47 of the Act of 1932 to show that intention.

Fitzgerald K.C. replied.

LORD GODDARD C.J. In many of these cases, no doubt, the drawing of the mortgage deeds is a very simple matter, because a printed form is used. Printed forms are sometimes traps for the unwary, for there may be some things in the transaction, which a skilled conveyancer would notice, for which the printed common form is not altogether appropriate. No doubt that would very seldom occur in this class of case, but it is a thing which might occur. The investigation of title is not in all cases, especially in small places in the country, an altogether simple matter, although in most cases it may be, especially now that there is registration of title.

By s. 47, sub-s. 1, of the Solicitors Act, 1932, as amended by s. 23, sub-s. 1, of the Solicitors Act, 1941, any unqualified person who, either directly or indirectly, draws or prepares any instrument relating to real or personal estate commits an offence " unless he proves that the act was not done for " or in expectation of any fee, gain or reward." Mr. Fitzgerald said that it was rather remarkable that no offence was committed if it were done voluntarily, while there was an offence if a charge were made. The legislature may have thought that if a man allowed another to draw a conveyance for him for nothing he took the risk that the deed would be worth exactly what was paid for it, that is to say, nothing.

In this case, the local authority, finding that they were losing money over the transactions under the Act of 1899, sought to reimburse themselves for their losses by a device whereby, instead of instructing solicitors to carry out the mortgage business and the conveyancing attached to it, they instructed their clerk to do it. The clerk is not one of the persons mentioned as qualified in s. 47, sub-s. 1: he is an unqualified man so far as this matter is concerned, although I have no doubt that, so far as his duties as clerk to a local authority are concerned, he is a highly skilled official; but for those duties he does not have to be a solicitor or a barrister. The question is whether he has committed an offence in this particular connexion.

The justices have convicted because they held that it was ultra vires the council to make a charge at all. I think that, though they had evidently given great attention to the case, they were wrong on this point, and Mr. Paull does not seek to uphold the convictions on that ground. By s. 9, sub-s. 3, of the Small Dwellings Acquisition Act, 1899, "All expenses "of a local authority in the execution of this Act shall be paid "in the case of a county out of the county rate, and in the "case of a county borough out of the borough fund or borough "rate, and in the case of any urban or rural district out "of any fund or rates applicable to the general purposes of "the Public Health Act . . . ." The part of s. 9, sub-s. 3, just read was repealed, but the Local Government Act, 1933, provided by s. 188 that all liabilities falling to be discharged by the council should be discharged out of its general rate fund. The justices, I think, took the view that this conveyancing charge was a liability of the council, which of course it is not; nor is it a liability of the council incurred in the execution of the Act of 1899: it is a charge which the mortgagor has to pay. The mortgagors formerly paid it to the solicitors employed by the council, and they paid it to the council when they chose to appoint their clerk to do the business instead of employing solicitors. There is nothing in that point, and the justices took a wrong view.

They next held that the clerk was a public officer. In my opinion, they were wrong in that view, too. The council were perfectly entitled to call upon the mortgagors to pay the expenses of the mortgage ; there is nothing ultra vires in that. The only question is whether they were entitled by their clerk to prepare and draw these mortgages. On that question, Mr. Fitzgerald has taken two points : he argued first that the clerk did not act for any fee, gain or reward, because the fee, gain or reward went into the general rate fund. We really cannot accept that contention : the council are a corporation, and for this purpose they are a person within the meaning of s. 47 of the Solicitors Act, 1932. That has been made quite clear by the amending Act of 1941 ; and, of course, they can only act by their servants. They are responsible for the acts of their servants and by the instructions which they may give their servants. The council acted for a fee or reward : they made a charge to the mortgagors which they had to pay. What the council do with the money thus paid to them—whether they pay it into one banking account or any other—does not matter in the least. The members of the council do not get the benefit of it, but the council itself does : it gets the money. It made a charge, therefore it was acting for a fee, gain, or reward.

There remains the question whether the clerk to the council is a public officer. By s. 47, sub-s. 3, of the Act of 1932, " This section shall not extend to (*a*) any public officer drawing or preparing instruments in the course of his duty . . . ." To the words " public officer " different meanings can be given according to the statute in which they occur. For instance, I called attention in the course of the argument to the expression " public officer " to be found in the Country Bankers Act (7 Geo. 4, c. 46). Under that Act country bankers who were carrying on business in partnership had to appoint for certain purposes certain members of the partnership who were to be known as " public officers." The " public officer " under that Act was appointed for a particular purpose under a particular Act ; he was not paid out of public funds. We have to consider whether in this Act of 1932 the expression " public officer " refers to any clerk of a local authority or whether it must not be given a stricter interpretation, that is to say, a public officer who is an officer of a public department. Our attention was called to *Lyme Regis Corporation* v. *Henley* (1), but that case really decided that, where a corporation had a grant of lands which grant imposed a public duty, any member of the public who was injured by breach of the duty could maintain an action,

(1) 2 Cl. & F. 331.

just as a member of the public using a highway who is injured by an act of misfeasance has a cause of action against the highway authority responsible for the maintenance of the road. Lyme Regis Corporation were charged with the duty of maintaining a certain work, and any member of the public with a right to visit it who was injured could maintain an action against the corporation, because the corporation were public officers for that purpose: they had a duty to perform which was imposed on them as a condition of the grant of land.

We have to remember that the object of this Act of 1932 is to see that conveyancing matters are carried out by qualified and not unqualified persons. We certainly ought not to give a very wide meaning to the word "public officer," for that would be opening the door to claims by a great number of people, perhaps, to the right to do conveyancing, which it was clearly not intended by Parliament that they should do. Light is thrown on the matter by s. 77, which provides: "Nothing in this Act shall prejudice or affect any rights or "privileges of the solicitor to the Treasury or to any other "public department (including the Ecclesiastical Com-"missioners and Queen Anne's Bounty) or to the Duchy of "Cornwall, or require any such officer as aforesaid or any "clerk or officer appointed to act for him to be admitted or "enrolled or to hold a practising certificate in any case where "it would not have been necessary for him to be admitted or "enrolled or to hold such a certificate if this Act had not "been passed."

It is, of course, an offence under other sections of the Act of 1932 for a person who is not qualified, who is not holding a practising certificate, to act as a solicitor. As is well known, solicitors to a public department such as the Treasury Solicitor and various other solicitors in public departments are not on the roll of solicitors; they are barristers, but they are expressly exempted from the prohibition. It is relevant to consider also the Solicitors Act, 1933, where the expression "public officer" is also used, though the definition of "public "officer" in s. 4, sub-s. 2, is limited to the particular section, that is, s. 4. By sub-s. 2, "In this section the expression "'public officer' means an officer whose remuneration is "defrayed out of—(*a*) moneys provided by Parliament; or "(*b*) the revenues of the Duchy of Cornwall or the Duchy of "Lancaster; or (*c*) the common fund of the Ecclesiastical Com-"missioners; or (*d*) the general fund of Queen Anne's Bounty; "or (*e*) the fund of the Electricity Commissioners; or (*f*) the

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"Forestry Fund; or (*g*) the Development Fund; or (*h*) any "other revenues or fund for the time being prescribed by the "Treasury." A public officer in that section is a public officer who is the officer of a public department, one of the Departments of State, or one of the departments set up under various Acts of Parliament, and an officer whose salary is charged on national as distinct from local funds.

That was the opinion of Cave J. in *In re Mirams* (1). There he had to consider, sitting in Bankruptcy, whether the assignment of the salary of a chaplain of a workhouse and workhouse infirmary was void as being against public policy, because it had been held in many cases that a public officer, that is to say, an officer paid out of national funds, cannot assign his salary. Cave J. said (2): "it is true that the salary is "paid out of a poor rate, and that the chaplain, although "appointed by the guardians, can only be dismissed by the "Local Government Board; but I am of opinion that this is "no solid ground of distinction. To make the office a public "office, the pay must come out of national and not out of "local funds, and the office must be public in the strict sense "of that term." The question there was whether a certain transaction was void as being against public policy, but it seems to me that those words equally apply to this case, and I have no doubt that the words "public officer" in s. 47, sub-s. 3 (*a*), of the Act of 1932 should be limited to a public officer in the strict sense, that is to say, to an officer of a public department, whose salary is charged on national and not local funds.

For these reasons, the appeal fails. The convictions are upheld, but on entirely different grounds. In fact, in the ground on which the justices convicted, we think that they were wrong; and in the ground on which they intimated that they would dismiss the summonses, they were equally wrong. In the result they were right.

HUMPHREYS J. I agree.

FINNEMORE J. I agree.

Appeal dismissed.

Solicitors for the appellants: *Savery, Stevens & Nutt, for R. A. Young & Pearce, Nottingham.*

Solicitors for the respondent: *Hempsons.*

(1) [1891] 1 Q. B. 594. (2) Ibid. 596.

R. C. C.

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Mar. 2, 3, 4, 17.

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REX *v.* PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL. *Ex parte* BELL LONDON & PROVINCIAL PROPERTIES LD.

Landlord and tenant—Furnished houses rent control—Contracts of tenancy referred to tribunal by local authority—Insufficient and inaccurate data of tenancy in reference—Invalidity of reference—Adjudication by tribunal—Jurisdiction—Certiorari—Prohibition—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34) *s.* 2.

In purported exercise of the powers conferred on them by s. 2, sub-s. 1, of the Furnished Houses (Rent Control) Act, 1946, a local authority referred to a rent tribunal, by separate references 302 contracts of tenancy in relation to flats in a large building belonging to the applicants. In some of the references, the name of the lessee of the flat was wrongly given; in others the name of a former lessee was mentioned and in others again lessees were shown as occupying flats which were vacant. In addition, all the flats were shown as being furnished, irrespective of whether they were let with furniture or not. The tribunal heard eight of the cases referred to them, which were, in fact, cases of furnished tenancies within the meaning of the Act and, as the result of a visit paid to the flats before the hearing, they formed the opinion that by reason of the height of the flats, they were not up to modern standards, and reduced the rents in the eight cases before them. Neither at the hearing nor beforehand were the applicants given an opportunity of dealing with the question of the height of the flats. The applicants applied for an order of certiorari to bring up and quash the order of the tribunal in the eight cases on which they had adjudicated, and for an order prohibiting the tribunal from proceeding with the hearing of references relating to the remaining flats, on the ground that the references were invalid and that, consequently, the tribunal had no jurisdiction:—

Held, that the method of reference adopted by the local authority indicating, as it did, that no investigation or inquiry could have been made by them into the nature of the contracts of tenancy referred by them to the tribunal, did not constitute a valid and bona fide exercise by the local authority of the powers conferred on them by Parliament. It was never intended by the Act that a local authority should refer cases of contracts in respect of which they had neither received a complaint from the tenant, nor had themselves made any inquiry to see whether there was a prima facie case or anything to indicate that there was any unfairness in the rent charged. The references were bad ab initio, and the fact that the tribunal had selected for hearing eight cases in which the flats were furnished and consequently came within the terms of the Act, did not, in those cases, turn an invalid reference into a valid one, since no more attempt had been made by the local authority to consider whether there was any ground for referring them, than had been made in other cases. Certiorari and prohibition must therefore issue.

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Held also, that even if the references in the eight cases heard by the tribunal had been unobjectionable, certiorari would none the less issue on the ground that the tribunal, after inspecting the flats before the hearing, had largely based their decision on the fact that the flats were not up to modern standards in regard to height, without making any reference to that matter at the hearing or giving the applicants any opportunity of dealing with it.

Dicta in *Rex* v. *Hampstead and St. Pancras Rent Tribunal Ex parte Ascot Lodge Ld.* [1947] K. B. 973, and *Rex* v. *Paddington and St. Marylebone Rent Tribunal Ex parte Bedrock Investments Ld.* [1947] K. B. 984, considered and explained.

MOTION for orders of certiorari and prohibition.

The facts, which are more fully stated in the written judgment of the court, were briefly as follows: The applicants, Bell London and Provincial Properties, Ld., were the owners of a large building, Park West, in the borough of Paddington which contained 555 flats, the majority of which were let on short tenancies. To a great many of them the Rent Restriction Acts applied, so that the rents were controlled. 208 were occupied by statutory tenants holding over at controlled rents under the Acts, 124 were let unfurnished at rents controlled under the Acts, three were let as business premises and the remaining 37 were let unfurnished and were not subject to the Acts. All the leases were in the same form and under them the landlords covenanted to supply gas and electricity and there were a variety of services, such as lifts, refuse collection and a swimming pool which were not mentioned in the leases. The tenants had the advantages and amenities usually found in blocks of high-class flats in the West End of London, with every reason to expect that they would continue to enjoy those amenities during their occupancy, though the landlords did not bind themselves to supply them. In 1947 two tenants of flats in the building had referred their contracts to the tribunal under the Furnished Houses (Rent Control) Act, 1946, s. 2 (1) and had obtained

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(1) Furnished Houses (Rent Control) Act, 1946, s. 2, sub-s. 1: "Where a contract has .... "been entered into whereby one "person .... grants to another "person .... the right to "occupy as a residence a house "or part of a house .... in "consideration of a rent which "includes payment for the use of "furniture or for services, ... "it shall be lawful for either "party to the contract or for "the local authority to refer the "contract to the tribunal for "the district, and where any "such contract (hereinafter "referred to as a contract to "which this Act applies) is so "referred to the tribunal, they

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a reduction of rent. It was thereafter decided by Paddington borough council that in the case of any property in respect of which two or more reductions of rent had been made by the tribunal, all other contracts of letting in the same property, to which the Act applied, should be referred to the tribunal. In pursuance of this policy they instructed the town clerk to refer to the tribunal, by a single reference, all the remaining contracts in Park West to which the Act applied. Accordingly, on February 3, 1948, a general reference concerning all the flats was made but, later, in deference to the opinion expressed by the town clerk that a general reference was not valid, individual references in respect of 302 separate flats in the building were made. In many of the references the name of the lessee of the flat was wrongly given; in some the name of a former lessee was given and in others lessees were shown as occupying flats which were empty; and all flats were shown as furnished, irrespective of whether they were let with furniture or not. On April 20, 1948, the tribunal considered eight of the cases which had been referred to them, each of which was in fact concerned with a furnished flat. They reduced the rent in each of these cases. In giving their decision the tribunal stated that they were of opinion that they must disregard the amenities provided, when fixing the rent and also expressed the view that the height of the ceiling of the flats, eight feet, was not up to modern standards. The latter fact had been ascertained as the result of a visit to the flats by members of the tribunal and not from evidence given before them.

The applicants thereupon applied for an order of certiorari to bring up and quash the eight orders made by the tribunal

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“ may by a notice in writing
“ served on the lessor require him
“ to give to them, within such
“ period . . . . as may be speci-
“ fied in the notice, such inform-
“ ation as they may reasonably
“ require regarding such of the
“ prescribed particulars relating
“ to the contract as are specified
“ in the notice.”

Sub-s. 2: “ Where any contract
“ to which this Act applies is
“ referred to a tribunal, ...
“ the tribunal shall consider it
“ and, after making such inquiry
“ as they think fit, and giving to
“ each party . . . . an oppor-
“ tunity of being heard, or, in
“ his option, of submitting repre-
“ sentations in writing, shall
“ approve the rent payable under
“ the contract or reduce it to such
“ a sum as they may, in all the
“ circumstances, think reasonable
“ or may, if they think fit in all
“ the circumstances, dismiss the
“ reference, and shall notify the
“ parties and the local authority
“ of their decision in each case.”

and for an order of prohibition, prohibiting them from considering references to them in respect of the remaining flats.

Sir Valentine Holmes K.C. and *Derek Walker-Smith* for the applicants. The decision of the tribunal was bad in law on three grounds and should be quashed: (1.) It was outside the jurisdiction of the tribunal in that the requirements of the Furnished Houses (Rent Control) Act, 1946, were not properly complied with; (2.) the order of the tribunal was wrong in law on its face; and (3.) the tribunal failed to act judicially, there being no evidence before them as to the standard height of the ceilings of the flats. With regard to (1.), the reference to the tribunal was not a proper one, first, because what has to be referred is a contract of the particular kind mentioned in s. 2 of the Act. What were referred in the present case were not contracts but flats. It is true that the word "contract" was used in the block reference originally made, but the form of reference ought to indicate that it related to a contract of tenancy to which the Act applied, and not leave it to the tribunal to find out whether it was in fact such a tenancy. All the terms of the contract need not be set out in the reference, but it is not open to any person to refer to a tribunal a contract without knowing who the parties to it are, and still less if he knows none of its terms. In the present instance, some of the flats included in the block reference were vacant and, clearly, in those cases, the borough council could not be referring "a "contract" when in fact they did not know if there was a contract or not. If the procedure by a block reference originally adopted was good, the borough council could decide to refer to the tribunal the contract relating to every house in the borough, leaving it to the tribunal to find out to which of them the Act applied. Further, the reference referred to the tribunal unfurnished as well as furnished tenancies and also things which were not tenancies at all. The block reference was bad because it left it to the tribunal to do something which they were not obliged by the Act of 1946 to do, or indeed in a position, under their powers, to do. They could not go round and ask the landlords for particulars about the tenancies. If the block reference was bad, all the 302 individual references subsequently made by the borough council were also bad. Each one of those references referred to the tenancy concerned as a furnished tenancy, whereas many of them were not, and the borough council could easily have discovered what the true position was. The borough council by issuing the 302 references were perpetuating the block reference; they were merely issuing 302 pieces of paper instead of one. The essential point in the whole procedure is that what has to be referred to the tribunal is a contract of tenancy, so that the tribunal and, if necessary, the court can see whether it was a contract to which the Act applied. The Act must be taken to assume that the borough council would exercise some judgment before proceeding under s. 2, sub-s. 2. If they clearly, as in the present case, exercised no judgment, they must be taken to have acted vexatiously. Further, the orders made by the tribunal were bad on their face. Had they merely stated that the rents had been reduced, they would be good on their face, but the tribunal had chosen to make what had been called by the House of Lords "speaking "orders," and had given in their decision reasons which were clearly wrong in law, and certiorari would accordingly lie to quash the orders (see *Racecourse Betting Control Board* v. *Secretary for Air* (1); *Rex* v. *Nat Bell Liquors Ld.* (2); Halsbury's Laws of England, 2nd ed., vol. 9, p. 888, para. 1493).

The orders were also bad on their face because the tribunal, when considering a tenancy, were bound to look at all the existing circumstances, which included such matters as the kind of furniture provided, as well as the services actually rendered and the amenities provided by the landlord. The tribunal disregarded such matters as services which were either withdrawable or which were not mentioned in the contract. They had wrongly directed themselves that they were not entitled to regard them, and had so stated in the decision given by them. Finally, certiorari would also lie, because the rent tribunal, having inspected the flats, referred in their decision to the height of the ceilings without giving the landlords any indication of their intention to take into account the height of the rooms. Consequently, the landlords were given no opportunity at the hearing of shewing that the tribunal's view on this question was wrong. Although the good faith of the tribunal was not impugned, their failure to tell the landlords what was in their minds, was contrary to the principles laid down in the *Board of Education* v. *Rice* (3), and *Errington* v. *Minister of Health* (4).

(1) [1944] Ch. 114.
(2) [1922] 2 A. C. 128, 154.
(3) [1911] A. C. 179.
(4) [1935] 1 K. B. 249.

Sir Frank Soskice S.-G. and *H. L. Parker* for the Paddington and St. Marylebone Rent Tribunal. The position of the rent tribunal in these proceedings must be distinguished from that of the borough council. The tribunal is charged with certain duties under the Act, but it does not initiate those proceedings, and once they have been initiated, the tribunal has a duty to perform. It must decide whether to enter on the reference or not and might be subject to proceedings for mandamus if it refused to proceed. It is not now suggested that the block reference originally made was a lawful document within s. 2, sub-s. 1, of the Act, since it did not comply with art. 4 of the Furnished Houses (Rent Control) Regulations, 1946, but there is nothing in s. 2, sub-s. 1, to shew the tribunal that a block reference was necessarily incompetent. The order made by the tribunal was not bad on the face of it as contended on behalf of the applicants. The tribunal in assessing the rent, were right, on the construction of s. 1, sub-s. 2, of the Act, in taking the view that they ought to disregard services, either not contracted for, or contracted for subject to the landlords' right to withdraw them without compensation. Even if the tribunal's order bore an error on its face, certiorari would not lie to quash it unless the error was one which showed that the tribunal had in some way exceeded their jurisdiction and had considered something which had never been referred to them. In any event their order was not "a speaking" order, since the actual decision of the tribunal was merely that part of the order fixing the rent of the eight flats in question, and no error was apparent on the face of that decision. The action of the tribunal in basing their decision to some extent on the height of the ceilings of the flats without intimating that that factor might influence their decision was not an unjudicial proceeding on their part. They had already, on their visit to the flats, made their view on that point clear and that entirely distinguishes the case from one, e.g., where after the hearing, the tribunal acts on an ex parte communication from one side, which it does not communicate to the other, so that that other remains in ignorance that the communication had ever been made. Going to see the flats was the best way of forming an opinion regarding the proper rent to be paid for them. On the questions of prohibition and as to whether there was a proper reference in this case at all, the tribunal are anxious to have the views of the court for their guidance. With regard to the question of certiorari, so far as it relates to the cases of the eight flats

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with which the tribunal dealt, it will not lie, since these cases, which all dealt with furnished flats, clearly related to tenancies within the meaning of the Act. There was a specific reference in the case of each of those tenancies, and the requirements of the Act were complied with in every respect. The cases having come before the tribunal, it was bound to consider them and whatever may have been in the mind of the borough council, the decision in these eight cases ought not to be brought up to be quashed. Finally, assuming that the references here were based on entirely inadequate reasons in pursuance of the policy adopted by the borough council, prohibition will not lie because in order that it should be exercised, it must be shown that there had been no valid reference within the meaning of s. 2, sub-s. 2, of the Act, not that it was a reference based on wrong or inadequate reasons.

Harold Willis for the Paddington Borough Council. The reference to the tribunal which the Act contemplates is not one merely for the purpose of reducing rent, though that may be a consequence of the reference. If a local authority purports to refer to the tribunal a contract which is not within the Act, it is agreed that that would be a nullity, and it is also conceded that the block reference originally made in these cases was not within the Act. Parliament has conferred very wide powers on the local authority and it is wrong to conclude that the Act is only intended to protect the poorer class of tenants.

[LORD GODDARD C.J. Does the Act mean that the borough council can refer any contract without finding out whether it comes within the Act or not?]

There is nothing in the Act as to the steps, if any, which the local authority are required to take before initiating proceedings. Here there was a block of flats with a number of lettings, and in two cases the tenants had complained of being overcharged. The tribunal accepted those complaints and reduced the rents. Was not the borough council thereafter entitled to say that there was prima facie evidence that the landlords had overcharged other tenants? It might not be a very wise way for the local authority to carry out their duties, but that is a different thing from saying that the local authority with the knowledge which they possessed, were not entitled to refer other cases to the tribunal. Supposing that in the first batch of references made there had been included the whole of the 182 furnished lettings which admittedly fell within the Act, and that the cases were put forward in individual references, without any inquiry being made as to whether they came within the Act or not, could it be said that because inquiries had not been made, those references, valid on their face, and dealing with contracts within the Act, were vitiated so that the tribunal could not deal with them? Assume further, that in those references, were included ten cases which were not within the Act and regarding which no inquiries had been made, could it be said that the whole of the references were vitiated? If a thousand cases were referred and 992 were wrongly referred, the remaining eight which fell within the Act would be properly before the tribunal. There is nothing in the Act which imposes any obligation on the local authority to make any inquiries before making a reference. The authority are given powers to take certain action under the Act and it is submitted that the resolution passed by the council, after the rent of two tenants had been reduced, was a bona fide exercise of the powers given to them, although the court might not approve of what was done. There need not be a complaining tenant before the local authority refers a case. They may take action without any complaint having been made, because it may well be that for some reason or another a tenant may prefer to pay a higher rent than he need, rather than raise any question. So far as the claim for certiorari is concerned, it relates only to the eight cases on which the tribunal have adjudicated and as those are cases which are admittedly within the Act so far as all the formalities were concerned, there is nothing in the initiation of those proceedings by the borough council which, in itself, could afford any ground for the issue of an order of certiorari. With regard to prohibition, the application is based on the ground that some of the references relate to contracts which are not within the Act. It is submitted that prohibition does not become the proper remedy unless and until the tribunal shew an intention of dealing with such cases since the time to issue prohibition is when the inferior tribunal indicates that it is about to do something which it has no jurisdiction to do. As to the remaining cases which fall within the Act, if in those cases the references were good and the requirements of the Act have been complied with, the fact that they are joined up with bad references, does not vitiate them.

Sir Valentine Holmes K.C. in reply.

Cur. adv. vult.

1949

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v.
PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL.
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March 18. LORD GODDARD C.J. read the judgment of the court as follows: Sir Valentine Holmes moves on behalf of Bell London and Provincial Properties Ld. for an order of certiorari to bring up to be quashed eight orders made by the Rent Tribunal for Paddington and St. Marylebone on May 5, 1948, under the Furnished Houses (Rent Control) Act, 1946, whereby they ordered the rents of flats Nos. 29, 77, 92, 136, 189, 207, 614 and 623, Park West, W.2. of which the applicants are the landlords, to be reduced. He also moves for an order prohibiting the tribunal from proceeding with references relating to any other flats at Park West made, or purporting to be made, by the council of the Metropolitan Borough of Paddington to the tribunal. The questions raised by these motions are of great public interest and importance, especially to the owners of blocks of flats, and it is satisfactory, therefore, that the case has been fully argued by the Solicitor-General for the tribunal and by Mr. Harold Willis for the borough council, who both opposed the motions.

The facts, which to say the least are unusual, are fortunately not in dispute. Park West is a large modern building containing 555 flats. Its situation may be described as at the junction of Kendal Street and Edgware Road, not far from the Marble Arch. The majority of the flats are let on short tenancies, and in fact, the eight in respect of which orders have been made are all let for three months only. To a great many of them the provisions of the Rent Restriction Acts apply, so that the rents are controlled. At the material time, 182 flats were let furnished; of the rest, 208 were occupied by statutory tenants, that is by persons holding over at controlled rents under the provisions of the Acts; 124 were let unfurnished at rents controlled under the Acts, three were let as business premises, one was vacant and the remaining thirty-seven were let unfurnished and were not subject to the Acts. All the leases are in the same form, and under them the landlords covenant to supply gas and electricity. The leases set out a variety of services and things which the landlords say they will supply but subject to their right to withdraw them at any time without notice, so there is no covenant to supply them, and there are a variety of services which are, in fact, supplied, such as lifts, refuse collection, and a swimming pool, which are not mentioned in the leases. In short, the tenants have the advantages and amenities usually found in blocks of high-class flats in the West End of London with every reason to expect that they will continue to enjoy them during the occupancy, though the landlords do not bind themselves to supply them. As a matter of business and common sense, the landlords will, of course, do their best to give these services, knowing full well that if they do not, their chance of letting at remunerative rents would be greatly imperilled.

It is worth noticing here that since it has been decided both in this court and the Court of Appeal in *Rex* v. *Paddington and St. Marylebone Rent Tribunal Ex parte Bedrock Investments Ld.* (1) that these tribunals cannot reduce rents below the standard rents, and as vacant premises and business premises are not within the Act of 1946, there would seem to be no conceivable purpose or good reason for referring 336 of these flats to the tribunal. However, although in February, 1948, the company seem to have been on the best of terms with their tenants, on the 27th of that month they received from the tribunal forms, known as F. R. 4, in respect of each flat in the block, notifying them that an application had been made to them by the local authority to consider the rent of flat number so and so, and each notice was accompanied by form F. R. 4a requiring the lessor, under severe penalties, to give the information specified in the form. At the same time there were served on each of the tenants two forms addressed to them not by name, but as the occupier of such and such a flat. We need not describe or particularize them, as the tenants, for whose assistance and protection these forms were presumably served—and, no doubt, under the regulations they were quite properly served by the tribunal—one and all just ignored them. So 2,220 forms were sent out and the expenditure on paper and postage, to say nothing of the clerical labour involved, must have been quite considerable.

How then, did this all come about ? It seems that in the summer of the previous year two tenants of flats at Park West had referred their agreements to the tribunal and obtained a reduction of rent. On what grounds the tribunal acted in those cases we were not informed. It seems to have escaped the manager's recollection, as he said in his affidavit that no tenant had ever complained of his rent, which we now know was not the fact, but of the merits or grounds on which reductions were granted we know nothing. For present

(1) [1947] K. B. 984.

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purposes they are doubtless immaterial. But we now learn from the affidavit of the chairwoman of the Public Health Committee of the borough council, to which the council had delegated their powers under the Act, that on December 3, 1947, and again on January 14, 1948, the committee decided, as a matter of policy, that in the case of any property in respect of which two or more reductions of rent had been made either before or after December 3, 1947, by the tribunal, all other contracts of letting to which the Act applied (mark those last five words), relating to such property, should be referred to the tribunal. Accordingly, they instructed the town clerk to refer by a single reference all the contracts in Park West to which the Act applied.

It is only fair to the town clerk to say that we were informed by counsel that he advised that a single reference was bad. He has filed no affidavit, and all we know is that on February 3, by a notice known as F. R. 1, a reference was made to the tribunal. It is in these terms: "I hereby apply to the "tribunal to fix the rent payable for the premises described "below." Then the form provides spaces for the address of premises, stating whether the premises consist of the whole or only part of a house, and the address given is simply "Park West, W.2." The second space is for the insertion of the name of the person to whom the premises are let. This is filled in as follows: "All contracts of tenancy within the "above-mentioned property to which the F. H. (R. C.) Act, "1946, applies; other than those contracts previously referred "to the tribunal (scheduled over-leaf)" and the schedule contains the numbers of two flats, 457 and 359, which are the two that we have already mentioned as having been previously referred. The applicant's name and address is given as that of the person by whom the premises are let, and the fourth space on the form is for the purpose of stating whether the premises are let with (*a*) use of furniture, and (*b*) services. No answer was given to that requirement.

It was in consequence of that so-called reference that the first 2,220 forms were sent out. We may here state that neither the Solicitor-General nor Mr. Willis contended that that reference was good. The Solicitor-General said that he did not attempt to support it because it did not give the names of the lessees, as the regulations which prescribed this form, required. This is an exceedingly narrow ground and, as will be found from the judgment of this court, in their opinion far more serious grounds exist for impugning the validity of that reference. The next thing that happened was that, apparently because the town clerk's opinion prevailed, though here again the matter has not been explained, the borough council proceeded to make individual references of each flat. Form F. R. 1 was sent to the tribunal in 302 cases, though whether they were all sent in on the same day we do not know, nor does it matter. On March 22, the tribunal sent to the applicants forty-six letters saying: "I am directed "by the tribunal to request you to return the enclosed "Form F. R. 4a duly filled in and completed by April 5, "1948" so 46 more forms F. R. 4a were sent and, thereafter, batches of 86, 84 and 89 were sent in, all dealing with different individual flats, making a total of 302 and, as apparently two notices were sent to each tenant, something like 1,200 more documents of one sort or another were served either on the landlords or on the tenants.

In the references which were sent to the clerk to the tribunal, the forms were now filled in so as to give a number to each flat as the address, a lessee's name was filled in, and in the space where the person applying to the tribunal has to state whether the premises are let with use of furniture and/or services, the answer "Yes" is given both as to furniture and as to services. We have not seen, naturally enough, all these forms of reference, but Mr. Willis told us that they were all in exactly the same form. Where the town clerk got the name of the occupants of the flats we do not know. Except for the affidavit from the chairwoman of the Public Health Committee, which informed the court of the policy adopted by the council, to which we have already referred, the council have not thought fit to file any evidence. What does appear, however, is that in many cases the names of the lessees of the flats are wrongly given, in some cases former lessees are mentioned, in others lessees are shown as occupying flats which were at the time, in fact, vacant. All flats are shown as furnished, irrespective of whether they were let with furniture or not, and most were not.

It is, therefore, perfectly clear that no sort of inquiry or investigation could have been made by the borough council before referring all these flats to the tribunal. It is certainly regrettable that documents of this nature, which institute proceedings, and which must put landlords to great trouble and considerable expense, should be prepared in this way without any real regard as to the accuracy of the information sent to the tribunal. It is clear, indeed, that this purported reference of individual flats was, in substance, nothing more than the block reference made in February, though it might, we suppose, be described as an endeavour to comply with the letter of the Act while letting the spirit take care of itself. It is, however, right to say that these references having been made, it is difficult to see that the tribunal could have done anything except act on them, though at the risk of serious depletion of their stock of forms. We do not propose to deal in detail with the correspondence which took place between the landlords and the tribunal beyond saying that we think it was regrettable that the tribunal never let them see the block reference in the first place, nor do we understand what reason there was for the refusal.

To complete the history, on April 20 the tribunal considered the eight cases in which orders were made, and in each of those cases the flat was furnished. It has been contended before us that there can be no ground for a certiorari in respect of those flats, at least on the ground that there was no proper reference. It is said that there were here flats which clearly came within the Act, and, therefore, that the tribunal had not only jurisdiction, but were indeed bound to hear the cases in relation to them, but in our opinion if there was no proper reference here, the proceedings were bad ab initio, and although it may well be that the tribunal did not know that the proceedings were bad, if they were, they had no jurisdiction to adjudicate. The first question we have, therefore, to consider is whether or not there ever was a valid reference in any of these cases.

The material section of the Act is s. 2, sub-ss. 1 and 2. [His Lordship read the sub-sections and continued :] Other sections of the Act provide for the local authority keeping a register of the tribunal's decisions, and by s. 4 it is made unlawful to require or receive payment of any sum in excess of the rent entered in the register, and in addition it provides that any excess may be recovered. By s. 9 a person who requires or receives any payment in contravention of the section is liable to a fine not exceeding 100*l*. and imprisonment for a period not exceeding six months.

In considering whether there has been a valid reference by the local authority, it is necessary, in our opinion, to consider whether on the facts of this case there has been a valid and bona fide exercise of the powers conferred by Parliament upon them. That the court can interfere with the exercise of powers by local authorities is not we think open to doubt. In *Biddulph* v. *The Vestry of St. George, Hanover Square* (1), Turner L.J. said: " Now, I am very far from thinking that " this court has not power to interfere with public bodies " in the exercise of powers which are conferred on them by " Act of Parliament. I take it that it would be within the power " and the duty of this court so to interfere in cases where there " is not a bona fide exercise of the powers given by Parliament; " and I should be very sorry to be supposed to entertain the " notion that public bodies, under the general powers given " to them by Act of Parliament, can do whatever they think " right."

The question also incidentally arose in *Dormer* v. *Newcastle-upon-Tyne Corporation* (2). In that case, under a local Act the corporation were authorized to place and maintain in any street any posts rails or other fence for the protection of passengers and traffic. The Court of Appeal held that there had been a perfectly proper use of the corporation's powers but, in dealing with an argument which was advanced, that unless some limitation were put on their powers the corporation could erect a high close-boarded fence in front of private premises, I said: " If in the exercise, or purported exercise, " of that power the corporation put up a close-boarded fence " ten or twelve feet high along the edge of the path, ... it " might very well be that the frontagers . . . . could say: " ' This is not the sort of thing which Parliament ever intended " ' that you should have the right to do. It is not an exercise " ' of the powers which have been given to you; because " ' while you are purporting to exercise that power, in fact " ' you are doing something entirely different ' ".

Now we approach the consideration of this Act, bearing in mind the words of Lord Lindley in *Thomson* v. *Lord Clanmorris* (3), where he said " In construing any . . . . " enactment, regard must be had not only to the words used, " but to the history of the Act, and the reasons which led " to its being passed. You must look at the mischief which " had to be cured as well as at the cure provided."

The object of the Act of 1946 is well known. It is to protect tenants who, at a time when accommodation was, and is,

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(1) (1863) 33 L. J. (Ch.) 411, 417.

(2) [1940] 2 K. B. 204, 217.

(3) [1900] 1 Ch. 718, 725.

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exceedingly difficult to obtain, were, and are, exposed to the risk of being charged exorbitant rents, but it is an Act designed for the protection of the tenants and not for the penalizing of landlords. It was passed at a time when the housing position was such that there was often no real freedom of contract between landlord and tenant, and the latter had to pay what was demanded. No doubt it was for this reason that Parliament did not confine the Act only to lettings below a certain rent. At the same time it does not follow that all landlords are rapacious, or that all rents are, at a time when demand exceeds supply, necessarily unreasonable.

No doubt, the reason why it was provided that cases might be referred by a local authority was because it was recognized that there might be tenants who would hesitate, themselves, to refer the case for fear of the consequences that might befall them, but it could never have been intended that local authorities could refer cases respecting which they had neither received complaint from the tenant, nor had made any inquiry as to whether there was a prima facie case, or anything to indicate that there was any unfairness in the rent charged. The borough council in question have decided as a matter of policy that in the case of any property in respect of which two or more reductions in rent had been made, all the contracts of letting to which the Act applied relating to such property should be referred to the tribunal. This may be a perfectly proper course to take in respect of certain cases, as for instance one or two houses in the same ownership all of which are let out in separate tenements to poor or working-class persons, but to apply this policy to 550 flats without any inquiry or indeed knowledge as to whether the Act applies or not, is an entirely different matter. If any such wholesale reference could be regarded as a legitimate exercise of their powers, it follows that the borough council could refer the whole of the tenancies in the Borough of Paddington to the tribunal, and that, whether there had been any previous reduction or not.

It was never intended that this Act should be used as a general rent-fixing tribunal throughout a district. It is to deal with individual cases where hardship exists or may be reasonably supposed to exist. The result of the action of the borough council in this case is that a great number of tenancies have been referred regardless of whether the premises are furnished or unfurnished, and without making any inquiry

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whether they are or not; regardless of whether any relief could be obtained by reason of the application of the Rent Restriction Acts to the flats; regardless of whether the premises are occupied as dwelling houses or business premises, and regardless, also, of the wishes of the tenants, which surely ought to be at least taken into account. It is one thing for a local authority to act for the protection of tenants who may be unable to take care of themselves, but it is quite another thing to act in the case of those who may be presumed to be capable and competent to act in their own interest, and who may have the greatest dislike for any interference with their contract of tenancy.

It is worth noticing in this connexion that the result of a reduction in rent being made is that it would not only be a criminal offence for the landlord to receive rent at the unreduced figure, but it would equally be an offence for the tenant to pay it, as he would thereby be aiding and abetting an offence, and, if he offered it, he would be guilty of inciting the landlord to commit an offence; and yet there must be many tenants who, having found a flat that suits them, and having agreed to pay what they regard as a reasonable rent, would resent being told that they were no longer entitled honourably to carry out obligations into which they had deliberately entered, and which they had neither the desire nor the intention of evading.

In our opinion the action of the borough council in referring the whole of these flats in the manner they have done is not a genuine exercise of the powers conferred on them by the Act, and we cannot refrain from saying that it is regrettable that in the form of reference, information purports to be given to the tribunal which is quite inaccurate, and which has been given without the slightest attempt to see that it was accurate. We refer more particularly to the statement on all the forms that the flats were furnished, when it now appears that the great majority were not, and we call particular attention to the fact that no evidence has been filed by the borough council to offer any explanation of this. In our opinion these considerations vitiate the whole reference, and the fact that the tribunal picked out eight cases of flats which do happen to have been furnished, does not turn an invalid reference into one which is valid. No more attempt has been made by the council to consider whether there was any any ground for referring those cases than in any other.

The proceedings at the hearing were truly remarkable. The council called no evidence. They did not put forward a single argument. Their representative merely informed the tribunal that as there had been two previous references by tenants, the council had commenced referring the remainder of the contracts of tenancy to the tribunal. When evidence was called by the landlords, not a single question in cross-examination was addressed to the witnesses. We have not been informed of any facts relating to the two previous cases in which reference was made or the grounds upon which the tribunal granted a reduction. It may very well be that they acted on the same view of the Act as that on which they acted in the cases now before the court, and which in the opinion of this court is erroneous. However that may be, we cannot agree that, in the circumstances of this case, the mere fact that two tenants had of their own motion complained and obtained some relief is any justification for this wholesale reference by the council.

That is really enough to dispose of this case, but there are other grounds on which it is said that certiorari should be granted. It appears that before the tribunal entered on the hearing there was an inspection of the flats by the members. In giving their decision the tribunal said: "In fixing the "rents of the various flats, it is not out of place to point out "that these flats are not up to modern standards. In no "single flat is the ceiling more than eight feet from the floor. "This is less than is required by present day standards." It appears from the affidavit of the chairman of the tribunal that during the course of the inspection they had some conversation with a Mr. Marshall, described as the manager of Park West, and another member of the staff and one or other of them, it is not clear which, agreed that the height of the ceiling which was measured, was less than that required by present-day standards.

It is no part of the duty of this court to review a finding of fact by the tribunal, though it is certainly remarkable that it should be found that flats of this description, erected, as we were informed, very shortly before the late war, and the plans of which must have been passed and approved by the London County Council, do not conform to present-day standards, when it is notorious that the building of this class of flats has not been allowed since the war. But not a word was said by anybody during the hearing, or at any time before the decision was given, as to this being a ground for reduction of rent. It has, in fact, taken the advisers of the applicants entirely by surprise, and surely in common fairness, if this was to be considered by the tribunal they ought to have given the applicants some opportunity of dealing with it. That this could ever have been in the minds of the borough council in referring these matters is, of course, impossible to suppose, and as we have already said, not a single word was said by the representative of the borough council as to any of the grounds on which the tribunal was invited to act.

In our opinion, to take into account a matter of this kind, of which no sort of intimation had been given to the applicants, brings this case exactly within the decision of the House of Lords in *Board of Education* v. *Rice and others* (1), the judgments in which are so well known that we need not set them out. On that ground alone, we think that the eight determinations in this case, even if the reference were unobjectionable, would have to be quashed.

Other grounds were put forward by Sir Valentine Holmes, among them, that as the tribunal had given a reasoned decision, he could attack the orders on the ground that they were bad on their face. We do not think it necessary to give any decision on this point, which would involve the consideration of a large number of cases, and any opinion we might express on it might, in view of the matters with which we have already dealt, be said to be obiter, though of course if this case should go higher the point will remain open and can be taken in another court.

In giving the decision of the tribunal the chairman said that before recent judgments of this court it had been their practice to take into account in their calculations the value of the services actually provided by the landlord. After quoting passages from my judgment in *Rex* v. *Hampstead and St. Pancras Furnished Houses Rent Tribunal; Ex parte Ascot Lodge Ld.* (2), and from the judgments of Atkinson J. and myself in *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Bedrock Investments* (3), he said that in consequence of those judgments they were unable to allow for the other services as they would wish to do. With all respect we think the tribunal has misunderstood what was said. I thought I had made myself clear and can only be sorry if I did not.

(1) [1911] A. C. 179.
(2) [1947] K. B. 973.
(3) [1947] K. B. 984.

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In the first place, it must be remembered that both those cases were dealing with what was necessary to give the tribunals jurisdiction to hear the cases, and in my opinion the dictum of Atkinson J. in the *Bedrock* case (1), on which reliance was placed, dealt only with this matter. It was laid down that an unfurnished flat did not come within the jurisdiction of the tribunal by reason of the landlord rendering services, in fact, unless the lease contracted or covenanted to give them. When I went on to express an opinion for the guidance of the tribunal in the *Ascot Lodge* case (2), I pointed out that if landlord had contracted to give certain services, and had broken his agreement, the tribunal could not reduce the rent on that account, because the tenant's remedy was then to obtain damages, and the law does not permit a reduction of rent by way of damages.

I repeated this in the *Bedrock* case (1) and said, further, that the tribunal could not reduce the rent—and, of course, I meant one that was otherwise fair—because the lease did not provide for something that in the negotiations the landlord had said he intended to provide. In other words the tribunal could not act as a court of rectification.

As the Solicitor-General invited us to express an opinion on the true interpretation of the Act for the guidance of tribunals, let me again endeavour, with the concurrence of the other members of the court, to make this matter clear. In our opinion, if premises are let furnished, or if the landlord has contracted in the case of either furnished or unfurnished premises, to supply or render services, the tribunal can only consider whether the rent is fair for that which the landlord has contracted to give. If he breaks his contract, that cannot be used as a ground for reducing the rent, because the law does not allow a reduction of rent by way of damages.

If, however, the landlord lets premises but does not contract to give or render any services the tribunal will have jurisdiction only if the premises are let furnished. If they are, the tribunal, in considering what is a fair rent, must take into account the services and amenities which the landlord in fact is supplying and the tenant enjoying, and which there is every reason to suppose will be continued, as obviously a tenant would be willing to pay a higher rent with the amenities and services than without them, and it is just that he should. So, too, if the premises are let furnished or unfurnished but

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(1) [1947] K. B. 984.

(2) [1947] K. B. 973.

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the landlord contracts to supply certain services and does in fact supply, though without obligation to do so, other services and amenities; in either of those cases, if the landlord ceases for whatever reason to continue the supply of all or any of what I may call the non-contractual services, the tribunal can reduce the rent to what would be fair with the contractual services plus such non-contractual services as he may continue to render, because, though the landlord commits no breach of contract, the tenant has a less valuable holding, and one for which a lower rent would be appropriate. In short, the rent ought to be fixed rebus sic stantibus.

The result is that an order of certiorari will issue to bring up and quash the determination of the tribunal in respect of the eight flats above mentioned, and an order will issue prohibiting the tribunal from proceeding to inquire into the remainder of the 302 flats at Park West referred to them by the borough council. The borough council will pay the costs of these proceedings.

Applications granted.

Solicitors for the applicants: *Simmons & Simmons.*

Solicitor for the respondent tribunal: *Solicitor, Ministry of Health.*

Solicitor for the Paddington Borough Council: *The Town Clerk, Paddington.*

P. B. D.

Affirmed. H.L. [1950] 1 All E.R. 737. | *Affirmed.* [1950] A. C. 361

JACOBS AND ANOTHER *v.* LONDON COUNTY COUNCIL.

C. A.

1949

Mar. 23, 24.

Tucker, Asquith and Singleton L.JJ.

Personal injuries—Negligence—Defective and projecting stopcock on forecourt between pavement and shop—Injured party stepping from pavement on to forecourt, intending to visit shop—Defendants occupiers of forecourt—User of highway—Invitee or licensee—Nuisance adjoining highway.

The female plaintiff, while proceeding from her home to a chemist's shop, stepped from the pavement on to a forecourt between the pavement and the shop, and owing to the defective state of a stopcock which was set in the forecourt tripped and fell and suffered injury. She and her husband claimed damages against the London County Council, who were the owners and occupiers of the forecourt and also the landlords of the shop.

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Held, that the female plaintiff was no longer a user of the highway, having intentionally left the pavement and stepped on to the forecourt on business which did not concern the owners of the forecourt, who were unaware of the defective condition of the stopcock. She was therefore merely a licensee, and her claim must fail, the defendants being under no duty to make the forecourt safe for her.

Decision of House of Lords in *Fairman* v. *Perpetual Investment Building Society* [1923] A. C. 74 followed and applied.

Held, further, that as she was not, at the time of the accident, a user of the highway, her claim for nuisance also failed.

Bromley v. *Mercer* [1922] 2 K. B. 126 and *Howard and Wife* v. *Walker and Lake* (*Trustees*) *and Crisp* [1947] K. B. 860 applied.

APPEAL from Ilford County Court.

The female plaintiff, Mrs. Jacobs, was a resident on an estate which the defendants, the London County Council, had laid out at Dagenham. On the day in question she was intending to go to a chemist's shop on the estate for the purpose of making a purchase, and having proceeded along Bennett's Castle Lane until she was opposite the shop she stepped from the pavement on to a forecourt, which lay between the pavement and the shop. The defendants were the owners and occupiers of the forecourt, which was some 10½ feet deep and the surface of which consisted partly of cement and partly of paving stones. They were also the landlords of the shop premises. In the forecourt, some 2½ feet from the pavement, there was set a water stopcock, which, owing to the sinking of the surrounding cement and stones, projected up about an inch and a quarter. The female plaintiff caught her foot in the projection, tripped and fell heavily, seriously injuring her knee. She and her husband brought the present action in the Ilford County Court, claiming damages, and were awarded 100*l.* and 37*l.* 10*s.* 0*d.*, respectively, by Judge Trevor Hunter K.C., who held that Mrs. Jacobs was an invitee within the principles of *Indermaur* v. *Dames* (1), and also that the defective stopcock and surrounding stones constituted a nuisance. The defendants appealed.

H. E. Francis for defendants. Mrs. Jacobs was a licensee of the defendants at the time she suffered the accident and not an invitee. Had she entered the shop and suffered injury on the chemist's premises she would have been there as an invitee. There must be an invitation by the occupier, express

(1) (1865) L. R. 1 C. P. 274.

or implied, and a visitor must enter upon business which concerns the occupier.

[ASQUITH L.J. Permission given by the landlords to the shopkeeper to carry on the business of a chemist might imply an invitation to a customer to visit the chemist's shop.]

It is submitted that the defendants gave no invitation to the plaintiff to enter the forecourt. She did not enter it on business which concerned the defendants, who had no material interest in whether or not customers went to the shop. Any interest which the defendants had in the prosperity of the chemist's shop is too remote to be material. The governing authority covering this branch of the law is the decision of the House of Lords in *Fairman* v. *Perpetual Investment Building Society* (1). There is no difference in principle between a lift or a staircase leading to flats or offices and a forecourt in front of a shop. In *Haseldine* v. *C. A. Daw & Son, Ld.* (2), where the plaintiff had suffered injury owing to the condition of a lift in a block of flats, it was held that whether he was an invitee or a licensee he could not succeed because the landlords had fully discharged their duty in either event. Scott L.J. was of opinion that the statements of principle in *Fairman* v. *Perpetual Investment Building Society* (1) were obiter, but Goddard and Clauson L.JJ. considered themselves bound by that authority.

[SINGLETON L.J. It is clear that both Scott and Goddard L.JJ. would have held that the plaintiff in *Haseldine's* case (2) was an invitee but for the speeches in the House of Lords, which were unnecessary for the decision in *Fairman's* case (1).]

The county court judge has found that the defendants did not know of the dangerous condition of the stopcock and therefore if the plaintiff was merely a licensee it is clear that the defendants are not liable. The learned judge has found in effect that she was not using the highway and he was fully supported in that finding by the evidence. The test is whether she steps off the highway in the course of using the highway, and that depends on the nature of the deviation. If a person walking on the highway inadvertently steps off the highway on to private property, to avoid some obstruction, he might be said to be still using the highway, but the plaintiff did not step off inadvertently. She left it intentionally in order to get to the shop and was no longer using the highway.

(1) [1923] A. C. 74.

(2) [1941] 2 K. B. 343.

The same test applies to nuisance. Provided the nuisance is sufficiently near the highway a person leaving the highway inadvertently is entitled to recover.

[*Owens* v. *Thomas Scott & Sons* (1); *Sutcliffe* v. *Clients' Investment Co.* (2); *Morgan* v. *Inc. Council of Girls Friendly Societies* (3); *Anderson* v. *Guinness Trust* (4); *Haseldine* v. *Daw & Son, Ld.* (5); *Bromley* v. *Mercer* (6); *Howard* v. *Walker* (7); *Wringe* v. *Cohen* (8); and *Hardcastle* v. *South Yorkshire Railway Co.* (9) referred to.]

Monier-Williams for plaintiffs. The learned judge came to a right determination on both points. The defendants have done everything they can to render this forecourt available for members of the public and it can be regarded as a piece of ground adjoining the highway. It is not material to consider how far from the inner edge of the pavement this damaged stopcock was, or what the plaintiff was doing at the time of the accident, because on the facts this court ought to regard the defective stopcock on that strip of ground as in exactly the same category as a rotten and dangerous fence, such as was the case in *Harrold* v. *Watney* (10). The owner of a dangerous fence adjoining the highway must be taken to know that people may lean against it and suffer injury. So it must have been within the knowledge of the defendants that this strip of land would be, as the evidence showed it was, habitually used by the public, for customers could only reach the shops by crossing the forecourt. The court ought not to draw a hard and fast line and say that immediately the plaintiff stepped over an imaginary line with the intention of going to the shop she lost the protection which the law gave against nuisances adjoining the highway. The law cannot depend upon what was in the plaintiff's mind at the time. In fact the plaintiff did not know she had left the highway. Having done everything to induce the public to use the forecourt as part of the highway the defendants cannot now be heard to say that the plaintiff was not using the highway. *Howard* v. *Walker* (7), is distinguishable, because there the shopkeeper and not the landlords were in occupation of the forecourt and the plaintiff was walking

(1) [1939] 3 All E. R. 663.
(2) [1924] 2 K. B. 746.
(3) [1936] 1 All E. R. 404.
(4) [1949] 1 All E. R. 530.
(5) [1941] 2 K. B. 343.
(6) [1922] 2 K. B. 126.
(7) [1947] K. B. 860.
(8) [1940] 1 K. B. 229.
(9) (1859) 4 H. & N. 67.
(10) [1898] 2 Q. B. 320.

from the shop to the highway. As to the question whether the female plaintiff was an invitee or a licensee it is submitted that the learned judge came to a right decision. *Fairman* v. *Perpetual Building Society* (1) has been cited in innumerable cases, but there appears to be no case in which this court has pronounced upon the status of a member of the tenant's family. *Fairman's* case ought to be considered strictly according to its facts. The decision in that case that the plaintiff was a licensee was apparently made with particular reference to the facts. In *Haseldine* v. *Daw & Sons* (2), Scott L.J. held that the plaintiff was an invitee and expressed the view that the statements of the learned Lords in *Fairman's* case (1) were obiter. It is clear that Goddard L.J., had he not felt himself bound by *Fairman's* case (1), would have come to a like decision.

TUCKER L.J. stated the facts and continued: The first question which has to be determined is whether, in the position in which she was when she fell, Mrs. Jacobs was an invitee of the defendant council or whether she was merely a licensee on this forecourt. The learned county court judge has found that the defendant council ought to have known of this unusual danger, and that they failed to know of it owing to the lack of reasonable care in the matter of inspection. It follows from that, and, indeed, the evidence shows, that they were not, in fact, aware of the existence of this danger. So we here have a clear-cut case in which it is essential to the decision on this part of the claim to decide whether or not the female plaintiff was an invitee or a licensee, because on the learned judge's finding of fact, if she was an invitee she was clearly entitled to recover; on the other hand, if she was a licensee it is equally clear that her claim must fail. When that issue is disposed of it may be necessary to consider the second part of her claim, which is put in the alternative, namely, on the ground of nuisance--that the defendants had created, or allowed to come into existence, that which was a nuisance adjoining the highway, by reason of which she had suffered damage as a user of the highway and in the course of her use of the highway; and that, it being a nuisance which the defendants had negligently failed to remedy, she claimed to be entitled to recover.

With regard to the plaintiff's status, the learned judge has

(1) [1923] A. C. 74.

(2) [1941] 2 K. B. 343.

held that she was an invitee within the principle of *Indermaur* v. *Dames* (1), but he has not given any reasons in his careful and full judgment showing the exact reasoning by which he arrived at that decision. This case appears to me to raise in acute form the problem which has troubled the courts from time to time in cases of this sort. First of all, it may be just as well to go back to the fountainhead of *Indermaur* v. *Dames* (1). Willes J., in the course of his judgment, said this: "The class "to which the customer belongs includes persons who go not as "mere volunteers, or licensees, or guests, or servants, or per-"sons whose employment is such that danger may be considered "as bargained for, but who go upon business which concerns "the occupier, and upon his invitation, express or implied. "And with respect to such a visitor at least, we consider "it settled law, that he, using reasonable care on his part "for his own safety, is entitled to expect that the occupier "shall on his part use reasonable care to prevent damage "from unusual danger, which he knows or ought to know."

There have been a number of cases similar to the present which involved claims, sometimes by tenants and sometimes by their guests or visitors, against landlords who had retained a staircase or other portions of property, in respect of injuries suffered on such staircases by guests and tenants. After a number of those cases had been through the courts, *Fairman* v. *Perpetual Investment Building Society* (2) reached the House of Lords, and that is now the governing authority covering this branch of the law. In that case the plaintiff was a lodger of the tenant—she was the tenant's sister—of a flat in a block of flats, and she met with an injury owing to the state of the stairs. She, accordingly, brought her action against the landlords, who retained control of the stairs, and one of the issues—and I should have thought that logically it was the first issue—in the case was what was the status of the plaintiff, was she a licensee or was she an invitee, because until that is determined it is not possible to measure or ascertain the nature of the duty owing by the landlords on the relevant facts. In dealing with that case Lord Atkinson, Lord Sumner and Lord Wrenbury all expressed the view, in very clear language, that the plaintiff was a licensee and not an invitee. Lord Atkinson, having set out the facts, said this: "When the owner of a flat lets it to a

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(1) L. R. 1 C. P. 274.

(2) [1923] A. C. 74.

" tenant for the purpose of its being resided in by the tenant " and his family the landlord must, I think, be taken to have " given permission for whatever is reasonably necessary " for the reasonable use and enjoyment of the flat for that " purpose. This would necessarily include permission to " the tenant and his family, his servant, the messengers " of the tradesmen with whom he dealt, his visitors and guests " and suchlike persons, to have access to his flat in order to " enable him and his family to live in it with the customary " amenities. It may be doubted whether lodgers were included " in the list of privileged persons, since, apparently, it was " not contemplated by either landlord or tenant when the " letting was made that the tenant should take in lodgers. " Whether that be so or not, however, I think it might be " held in this case, upon the principle upon which *Lowery* v. " *Walker* (1) was decided, that from the user of the stairs " for such a length of time as the lady has, to the knowledge " of the landlord's caretaker, in fact used them it was to be " inferred that she had the landlord's permission to use " them." (2) So the learned Lord is putting this lady into the category of the other persons to whom he had referred, namely, the family of the tenant, servants, messengers, tradesmen, visitors, guests, and suchlike persons. Having put her into that category, he says: " She was undoubtedly, when " using the stairs, using them as the invitee of the tenant, " though not of the landlord. Quoad the landlord she was, " I think, when using them at most merely his licensee. There " is nothing in the case to support the suggestion that the " tenant was authorized by the landlord to act as the latter's " agent to invite her. The landlord gave her no invitation, " it would appear to me, either direct or indirect, to use these " stairs." Then Lord Sumner said: " My Lords, I think " that the plaintiff was the defendants' licensee not their " invitee. Somebody builds the stairs, and the defendants " open the door, but the tenant gives the invitation. It was " not about the landlord's business that the plaintiff used " the stairs, though it may well be that, as a lodger to whom " the tenant was seemingly entitled to sub-let a room, she had " such a right to go in and out as to make her licence irrevocable, " so long as she remained a lodger. In this particular case, " however, it makes no difference to the liability whether " she was the defendants' licensee or their invitee " (3). And

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(1) [1911] A. C. 10.
(2) [1923] A. C. 85.
(3) Ibid. 92.

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Lord Wrenbury said: "It is well to define at the outset "what, in my judgment, is the relation between the plaintiff "and the landlord in respect of which she can sue. There "was no contractual relation. She was a person who, as "between herself and the landlord, was entitled to use the "landlord's staircase, because she was there rightly for the "purpose of gaining access to premises which he had demised "to a tenant with an implied right of use by the tenant and "all persons lawfully resorting to the tenant's premises. "She was, I think, the invitee of the tenant, and, in consequence, "the licensee of the landlord" (1).

In the course of their speeches the Lords dealt, at some length, with *Miller* v. *Hancock* (2) (especially it is to be found analysed and discussed in some detail in Lord Sumner's speech) and *Miller* v. *Hancock* (2) was overruled. The importance of that is that in *Miller* v. *Hancock* (2) the plaintiff who suffered injury was visiting premises which consisted partly of business flats, and was going there for business purposes. Lord Buckmaster, sets out the facts in that case. "The defendant Hancock owned a building in the city, the "different floors of which were let separately as chambers "or offices. The staircase by which access to and from "the street was obtained remained in his possession and control. "The plaintiff, who, in the course of business with one of "the tenants, was attending one of these sets of offices on the "second floor, fell on the stairs owing to their worn and "defective state and suffered injuries" (3). It was much discussed whether the true basis of the decision in *Miller* v. *Hancock* (2) rested upon some alleged contractual duty or whether it was based in tort, but having examined the case, Lord Sumner said: "If then *Miller* v. *Hancock* (2) is not a case "of a trap, but decides that an owner of property is liable "contractually to other than parties or privies, or non-"contractually is under a duty to repair, even though the "want of repair is patent, it is inconsistent with the authorities "cited, to which, except to name *Cavalier* v. *Pope* (4), it is not "necessary for me to refer" (3).

In 1941, in the case of *Haseldine* v. *C. A. Daw & Son, Ld.* (5), this court had occasion to consider *Fairman's* case (6) in a case

(1) [1923] A.C. 85, 95.
(2) [1893] 2 Q. B. 177.
(3) [1923] A. C. 79.
(4) [1906] A. C. 428.
(5) [1941] 2 K. B. 343.
(6) [1923] A. C. 74.

in which the plaintiff had suffered injury owing to the defective condition of a lift in a block of flats. The plaintiff was a solicitor's clerk visiting one of the tenants in this block of flats, of course on the solicitor's business, but the tenant was, apparently, the tenant of a residential flat. In that case the court decided that whether or not the plaintiff was a licensee or an invitee he could not succeed against the landlords, because the landlords had fully fulfilled their duty in either event. That is to say, they had done everything which was reasonable with regard to the repair of this lift, put it in the hands of competent engineers to repair and inspect, and so forth, and therefore, the plaintiff would not have succeeded whether he was an invitee or licensee. None the less, both Scott and Goddard L.JJ. considered with great care, and in some detail, whether or not the plaintiff was a licensee or an invitee. Scott L.J. came to the conclusion that the plaintiff was an invitee, and found himself able to arrive at that conclusion, notwithstanding the decision in *Fairman's* case (1), on the ground that he thought the statements of the Law Lords in *Fairman's* case (1) were all obiter dicta, because in that case also it was clear, on the facts, that the House of Lords were satisfied that in either event the plaintiff would not have been able to succeed. Feeling himself free to express his own view, he said this: "It is my duty to express my view. It is "that in the ordinary case the landlord of a block of flats, "who retains possession, occupation and control of the means "of access which he provides for the use of his tenants and "their visitors, has an interest of his own in facilitating access "to the flats not only of his tenants and their household "but also of their visitors, and, therefore, that when a visitor "avails himself of the proffered access he does so on the "implied invitation of the landlord. If so, the plaintiff "was the landlord's 'invitee'—to use a non-English word "made common, if not invented, by our judges."

Clauson L.J. did not deal with this matter, but he said this: "I have had the advantage of reading the judgment which "Goddard L.J. is about to deliver. For the sake of brevity "I desire to adopt as my own his statements of the facts "and also the conclusions which he reaches as regards the "failure of the plaintiff to establish a case for damages against "the landlord. I agree with Goddard L.J. that it becomes "unnecessary to determine whether the plaintiff was a licensee

(1) [1923] A. C. 74.

"or an invitee." When one turns to the judgment of Goddard L.J., although it is perfectly true that he states: (1) "But, even assuming that the plaintiff is to be regarded as "an invitee, I think that his claim must fail," none the less, before making that statement, he had considered, at some length, the question whether or not the plaintiff was an invitee and had come to the conclusion that he was bound by *Fairman's* case (2) to hold that the plaintiff was only a licensee. First of all he referred to *Mersey Docks and Harbour Board* v. *Procter* (3)—which is relied upon by Mr. Monier-Williams in the present case—and then he said this: "This brings "us at once to the question of what duty was owed by the "landlord to a person who came to the flats and used the lift "to visit a tenant and not on the business of the landlord. "Now I confess that, were it not for authority which binds "me, I should be strongly tempted to hold in the case of "flats and offices that, having regard to modern conditions "of life and business, the plaintiff ought to be regarded as "an invitee. Lord Sumner puts the matter tersely in *Mersey* "*Docks and Harbour Board* v. *Procter* (3), where he said: "'The leading distinction between an invitee and a licensee "'is that, in the case of the former, invitor and invitee have "'a common interest, while, in the latter, licensor and licensee "'have none'". I observe in passing that Lord Sumner was a member of the House that decided *Fairman's* case (2) and also a member of the House that decided *Mersey Docks and Harbour Board* v. *Procter* (3). Goddard L.J. then goes on: "In the case of blocks of offices in the city of London, "everyone knows that lifts are running all day not only for "the use of the tenants but for that of their clients and "customers. The landlord must provide facilities and con-"veniences to enable his tenants to carry on their business "if he wants to let the offices and keep his tenants. Surely "he would prejudice his prospects of letting on favourable "terms a second or third floor office to a stockbroker, solicitor "or merchant were he to say: 'Understand now, the lift "'is for you only. I do not undertake to allow your clients, "'or even your clerks, to use it. I may do so as a matter "'of grace, but that is all'. The more convenient and "attractive he can make his property for persons resorting "thereto on business, the better rent he can obtain. This

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(1) [1941] 2 K. B. 374.

(2) [1923] A. C. 74.

(3) [1923] A. C. 253.

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" applies equally to the case of residential flats, where tenants " expect and require facilities for their visitors, whether on business or social calls." He goes on to refer to *Fairman's* case (1) and he mentions that it had overruled *Miller* v. *Hancock* (2). Then he proceeds: " For this purpose I can see no distinction " between a staircase and a lift, which are merely alternative " methods of access. Both Lord Sumner and Lord Wrenbury " say in terms that the plaintiff was a licensee and not an " invitee of the landlords, and although they said that, in that " particular case, it made no difference whether the plaintiff " was the one or the other, I cannot regard their views on this " matter as being merely obiter. If they were, I think it " is for the House of Lords and not for this court to say so."

With respect, I find myself in precisely the same position as Goddard L.J. Whether or not what he said and what Scott L.J. said in the case were dicta, I think myself bound by *Fairman's* case (1), and I find it impossible to distinguish a case in which an injured person is visiting a shop or a professional office or a residential flat. It seems to me that the language in *Fairman's* case (1) covers all those classes of case, and the decision shows that in that class of case the landlord has not a sufficient interest in the visit of the injured person to make the latter an invitee. That he has some kind of remote interest, of course, is obvious from the examples given by Goddard L.J. and from the fact that in the case of a shop, if customers were not allowed to reach the shop the tenant might, and probably would, be unable to pay his rent, but the cases seem to show—with the authority of the House of Lords—that that is not a sufficient interest to make the visitor anything other than a licensee when he is using the staircase, or the forecourt, or some other part of the premises, which is in the occupation of the landlord, who has let the premises which he is visiting and which have got into a state of disorder. Therefore, I think that the learned county court judge was wrong in coming to the conclusion that the plaintiff was an invitee. I think she was merely a licensee. If the law in this class of case requires revision it must, I think, be for the House of Lords to revise it.

That brings me to the second branch of the claim, namely, nuisance. In regard to that the learned judge said this: " I also find that the stopcock and surrounding stones " constituted a nuisance."—as to that there is no dispute—

(1) [1923] A. C. 74.
(2) [1893] 2 Q. B. 177.

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" The cases as to nuisance on land adjoining a highway are " not in point, for the female plaintiff did not stray on to " the forecourt by accident. She went there deliberately. " But she was there lawfully and not as a trespasser. She " was injured by reason of a nuisance on land of the London " County Council, on which land she was present lawfully, " and on this ground the County Council are also liable. " I think that the principles laid down in *Wringe* v. *Cohen* (1) " are applicable, and that it is immaterial whether the County " Council knew of the nuisance or not."

With regard to that, Mr. Monier-Williams does not seek to uphold the reasoning by which the learned county court judge held the defendants liable in nuisance. He concedes that the case of *Wringe* v. *Cohen* (1) is not an authority which is helpful in the present case. *Wringe* v. *Cohen* (1) dealt with the duty owed by the occupier, or, at any rate, the landlord who had reserved to himself the right to enter upon premises which he had let, to the owner of adjoining property; the landlord having allowed his premises to get into a condition constituting a nuisance. That case is of no assistance with regard to the duty owed to persons using the highway, and in order to succeed in the present case Mr. Monier-Williams concedes that the plaintiff must show that this accident happened to her in the course of her user of the highway. He says, with regard to that, that the learned judge was wrong in saying that " the cases of nuisance on land adjoining the " highway are not in point, for the female plaintiff did not " stray on to the forecourt by accident. She went there " deliberately." Mr. Monier-Williams says that that finding is not supported by the evidence, and that on the true view of the case the plaintiff should be regarded as at all material times having still been using the highway. He says that this forecourt, with this stopcock in this dangerous condition, only two feet six inches from the pavement, should be regarded as in exactly the same category as a dangerous fence, such as in the case of *Harrold* v. *Watney* (2), and that it is immaterial whether the plaintiff knew she was on the highway all the time or not. Despite the fact that she had left the highway in order to go to the chemist's shop, not knowing whether she was really on the highway or not, she was really, says Mr. Monier-Williams, at all times still using the highway. He says that this dangerous stopcock was so near the highway

(1) [1940] 1 K. B. 229.

(2) [1898] 2 Q. B. 320.

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that the plaintiff would only have to deviate for hardly more than a few inches. Furthermore, he says, it is conceded—and this is a fact—that, on the authorities, if she had left the highway momentarily because of some obstruction on the highway and, in so doing, had met with precisely the same accident as that which befell her, she would have been able to recover. It seems curious, he says, that if that is the case she should not be able to recover because she was on the way to the chemist's shop. Of course, one does sometimes get remarkable consequences, when one has to draw the line, in particular cases, but I think the authorities are quite clear that in a case of this kind the plaintiff can only recover if he or she is, in fact, at the material time, using the highway. If she has got off the highway and is no longer on the highway, and she has done so deliberately and intentionally—and by "deliberately and intentionally" I do not mean knowing that she had left the highway, but pursuant to her deliberate purpose of reaching some place that is off the highway—then, in my view, she can no longer be said to have suffered the injury in the process of using the highway. Where a person has to step off the highway because of some obstruction, some momentary obstruction, although she is thereby physically off the highway, I think on the authorities she is regarded as still using the highway, having, so to speak, been forced off it.

For authority for this proposition I do not think it is necessary to go further back than *Bromley* v. *Mercer* (1), where the headnote is: "The defendants were the owners of a house and "yard abutting on a highway, and separated therefrom by a "wall which was in such a defective state of repair as to constitute a public nuisance in the highway. The plaintiff, a child "of nine years of age, who was visiting the tenant of the "premises, while playing in the yard was injured by a heavy "stone which fell from the wall upon her. In an action "against the owners for damages for the injuries so sustained: "*Held*, that as the plaintiff was not using the highway when "the accident occurred she was not entitled to recover damages "from the defendants." It is quite true that in that case, as is stated in the judgment of Lord Sterndale M.R., there is no evidence to show that the child was ever on the highway at all. There was not that distinction in that case, but the legal position is stated very clearly in the judgments of Lord Sterndale and Scrutton L.J. Lord Sterndale, after describing the facts, says: "The learned commissioner said in his "judgment: 'The point is a very fine one. The plaintiff "'was not in fact on the highway, she was in the yard. The "'wall, as I find, was a public nuisance abutting on a highway. "'Does the plaintiff lose her remedy as one of the public "'injured by the nuisance, because, in fact, she was not "'on the highway but was in the yard as the licensee or "'invitee of the tenant'." Then Lord Sterndale goes on: "That, I think, involves a fallacy. He seems to think that "where there is a nuisance to the highway everyone who "comes in proximity to it has a right of action which he "can carry about with him on to private premises." Scrutton L.J. said: "It is true that the defendants, the "landlords, are under covenant to keep the wall in repair, "and have not done so, but the commissioner has rightly "held that the plaintiff cannot sue them for negligence either "in contract or in tort because they are not in occupation "of the premises. The authorities justify that. But the "commissioner has gone on to find that the wall is in so "dangerous a condition as to constitute a public nuisance "to the adjoining highway. On that finding he has held "that the plaintiff, who has been injured in consequence "of the condition of the wall, is entitled to recover. But "the only person who can successfully sue for damages is "one who is injured in using the highway. There is no "authority for the extension of the law which the learned "commissioner has made, and, in my opinion, it is erroneous. "He seems to have relied upon *Harrold* v. *Watney* (1). But "there the plaintiff was using the highway, and that case "cannot be extended to a case where the person injured was "on the other side of a boundary fence and not using the "highway at all."

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(1) [1922] 2 K. B. 126.

In *Howard and Wife* v. *Walker and Lake* (*Trustees*) *and Crisp* (2), Lord Goddard C.J. dealt with this position. This was a case where the plaintiff received injuries on a forecourt before reaching the highway after leaving a shop, and what the Chief Justice said was this: "In this case the plaintiff "was a visitor or invitee of the tenant. Mr. Chapman sought "to put the case on the ground that the plaintiff was in fact "a user of the highway, that she was about to get on to it "and the accident happened while she was so doing, and he "endeavoured to support his case by reference to the well-

(1) [1898] 2 Q. B. 320.

(2) [1947] K. B. 860.

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" known series of authorities which decide that if a person " creates a danger, whether by excavation or otherwise, on " land immediately adjoining the highway, he is liable to a " person who may inadvertently step off the highway, and " who would thus, at once, be liable to be injured. This " seems to me really to amount to the same argument as that " which was unsuccessful in *Bromley* v. *Mercer* (1). There " the defendants were the owners of a house and yard abutting " on a highway and separated therefrom by a wall which was " in such a defective state of repair as to constitute a public " nuisance to the highway. The defendants were liable to " maintain and keep the outside of the premises in good repair " and condition. The plaintiff, who was visiting the tenant " of the premises, was in the yard and was injured by a heavy " stone falling from the wall upon her. It was held that she " had no cause of action against the landlords." Later he goes on : " It may well be, in this case, that had Mrs. Howard " been walking along the pavement and had inadvertently, " or for the purpose of avoiding some obstruction, stepped " on to the defendant's forecourt, which had nothing to fence " it from the highway, and had fallen owing to its defective " state, she might have been able to recover, as did the plaintiff " in *Owens* v. *Thomas Scott & Sons* (*Bakers*), *Ld. and* " *Wastall* (2) ; but here she met with the accident while she " was still the invitee of the tenant whose premises she was " at that time leaving. If she were entitled in this case to " recover against the landlords, I can see no reason why a " person leaving a house, abutting on a highway, who was " injured by the defective condition of the step, should not " also have an action, and yet that would be entirely contrary " to the line of authority of which the cases I have cited above " are instances. It may be that the law is not entirely " satisfactory on this point."

I cannot see that it makes any difference whether the accident happened to the person when she had left the highway on the way to the shop or when she had left the shop on the way to the highway. Nor can I see that it makes any difference whether the defective stopcock is two feet six inches from the highway or whether it is twenty-two feet six inches from the highway. Of course, it seems very hard, and it obviously is a matter of inches, but on the authorities I think it is clear that this lady did not meet with this accident in the course of the user of the highway. She had left the highway for the purpose of reaching some place off the highway. For these reasons, I think this appeal succeeds.

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(1) [1922] 2 K. B. 126.

(2) [1939] 3 All E. R. 663.

ASQUITH L.J. I agree that the appeal should be allowed. At times during the argument I had serious doubts whether the plaintiff might not, in fact, have been an invitee. It might be argued that she and the landlord had a common interest in her crossing the forecourt of the shop; her interest being that of a customer, the council's being the interest which the lessor of a shop has in attracting custom and providing security for the payment of his rent. There is nothing parallel to this consideration in the effect of *Fairman's* case (1), which proceeded expressly on the footing that the defendant had no interest whatever in the presence of the plaintiff on the common stairs or elsewhere on the premises. I have also felt doubts whether *Haseldine* v. *C. A. Daw & Son, Ld.* (2) binds us to any particular view of the status of the plaintiff in the present case, seeing that in *Haseldine's* case (2) the result would have been the same whether the plaintiff was a licensee or an invitee. But, though I still feel this is a difficult question, I have not sufficient confidence in the grounds of my own scepticism to press them to the point of dissent. I accordingly agree with my Lord.

SINGLETON L.J. I also am of the opinion that this appeal should be allowed, and I have reached that conclusion with very considerable regret. I think it is a matter for great regret that the law which has been discussed in this court today remains so obscure that it is still difficult, in so many cases, to determine what the precise position of the plaintiff is and what is the nature of the duty owed to the plaintiff. This plaintiff wished to go to a shop. She was a tenant on a housing estate of the London County Council, and she went along Bennett's Castle Lane, desirous of going to the shop of Messrs. Smith, Gard & Company, at No. 240 in that Lane. As she went along the highway, I suppose, the highway authority owed her some duty. Their obligation towards her, at least, was that they would not be guilty of any misfeasance. They would not be responsible to her for nonfeasance, but everyone knows that a highway authority inspects roads from time to time and has people to repair them, and people to whom reports

(1) [1923] A. C. 74.

(2) [1941] 2 K. B. 343.

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can be made if the highway falls out of order. When she reached a certain stage along the footway, Mrs. Jacobs turned to go to the shop. In between the highway and the shop was a piece of ground, some ten feet seven inches deep, a sort of forecourt of which the defendants, the London County Council, were the occupiers, though, apparently, they did not know that they were, for when this action was started against them they set up a plea, in para. 4 of their defence, to this effect: " So much of the said piece of land as lies in front " of the premises known as No. 240 Bennett's Castle Lane " is and at all material times has been in the occupation of " Smith, Gard & Co., Ld. under and by virtue of a lease dated " November 9, 1928, and made between the defendants as " lessors of the one part and the said Smith, Gard & Co. Ld. " as lessees of the other part." When that was examined it was found that it was not right. The question was raised in the county court and it was found that Messrs. Smith, Gard & Co., Ld. were not the occupiers of the forecourt at all, but that the London County Council were. It is said now—and I suppose it was said then—that if the London County Council were the occupiers of the forecourt, then the plaintiff was, at the most, a licensee when she was upon it. The duty owed to a licensee is different from that owed to an invitee. The occupier of the premises is under no obligation to a licensee to make them safe for use by him. A mere licensee must be content to take the premises as they are. So it is said that when the plaintiff, Mrs. Jacobs, went across that forecourt and tripped on a water stopcock, which was projecting above the footway, then she had to take the premises as she found them and the defendants are not responsible to her: and that is right. If she had been an invitee—and she would have been an invitee if she had got into the shop, because she would have been going there to do business with the shopkeeper—a different measure of duty arises.

This question as between invitee and licensee has been discussed for years. In the same volume of the Law Reports [1923] Appeal Cases, there are two cases, *Fairman's* case and the case of *Mersey Dock and Harbour Board* (1), where the difference between the two are set out. There are other cases which have been cited to us. I find it somewhat difficult, in this case, to draw distinction between the dock cases, *Smith* v. *The London and St. Katherine's Dock* (2) and *Mersey Docks and Harbour Board* v. *Procter* (1), on the one hand and this case upon

(1) [1923] A. C. 74, 253.

(2) (1868) L. R. 3 C. P. 326.

the other. The defendants, the London County Council, had developed the housing estate; they had an interest in the people upon the estate; and, though they had no direct business interest in the shop to which the plaintiff was going, they had retained, for some purpose of their own, the forecourt, on which she was when she met with the accident, and upon that forecourt was a stopcock for the purposes of a water supply to a flat, or flats, above the shop. The whole position is full of difficulty and full of doubt. In *Haseldine* v. *C. A. Daw & Son, Ld.* (1) Goddard L.J. said: "This brings "us at once to the question of what duty was owed by the "landlord to a person who came to the flats and used the "lift to visit a tenant and not on the business of the land-"lord. Now I confess, that, were it not for authority "which binds me, I should be strongly tempted to hold "in the case of flats and offices that, having regard to "modern conditions of life and business, the plaintiff ought "to be regarded as an invitee." That, in view of all the circumstances, is the view I should take of the plaintiff's position here, did I not feel bound by authority to come to an opposite conclusion. At one time I wondered whether the view formed by the learned county court judge that she was an invitee was sufficient, in that it might be said, in all the circumstances, that there was some evidence that she was in that category and that the learned judge had found that upon evidence, but, having regard to the authorities which have been cited to us, and in particular to the decision in *Haseldine* v. *C. A. Daw & Son, Ld.* (1), I do not feel able to hold that.

The other part of the case, the ground of nuisance, presents just as many difficulties and the law upon the subject is, to my mind, just as complicated. It is not disputed by Mr. Francis that if Mrs. Jacobs had been walking along the footway proper, and had stepped to one side because someone got in her way, or because the footway was not clear at that point, and had then caught her foot upon the stopcock, that the stopcock would have been a nuisance, and she would have been entitled to recover on the ground that there was a public nuisance and that she had suffered damage thereby. The stopcock, in fact, was only about two feet six inches or three feet from the footway and, so far as she could see—or anyone else could see—the whole place was just the same. She thought it was a footwalk, without a doubt, but she had turned away to her left to go to the shop and, so it was said, she had left

(1) [1941] 2 K. B. 343, 371.

the highway. She did not know she had, but she had left it, therefore she cannot recover. I suppose some people would call it a distinction without a difference. It is extraordinarily difficult to see why she should not, in the circumstances, recover, and yet the decisions show that she cannot.

My Lord referred to a judgment in the year 1947 of the Lord Chief Justice, in the case of *Howard and Wife* v. *Walker and Lake* (*Trustees*) *and Crisp* (1). In that case Lord Goddard ended his judgment in this way: "It may be that "the law is not entirely satisfactory on this point. No doubt "it is difficult for a layman to understand why, if he is walking "along the road and slips into an excavation at the side, he "should be entitled to recover, whereas if he slips into the "excavation as he is endeavouring to get on to the road he is "not. But I must take the law as I find it, and I have come "to the conclusion that it is not possible for me to hold that "the plaintiffs have a cause of action against the landlords. "Accordingly, they will have judgment against the defendant "Crisp, for 455*l*. 13*s*. 6*d*. and there will be judgment for the "other defendant against the plaintiffs." I too think that the law is not entirely satisfactory. It would be better that a piece of ground of this kind should be thrown into the highway so that someone may have responsibility for it, and that they should have some means of inspecting it. As it stands, if a person who goes upon that land is a mere licensee, that mere licensee must be content to take the premises as he, or she, finds them.

Mrs. Jacobs was injured by no fault of her own—that is found by the learned county court judge. She was injured because of projection upon a place which looked just like the highway but was not, in fact, and those who were the occupiers of the forecourt apparently, did not know that they were. I think it is most unfortunate for her, and I have great sympathy with her and with her advisers, who have found it so difficult to ascertain the true position.

Therefore, I am afraid that, upon the law as it stands, the appeal must be allowed; but I cannot help wishing that the law was otherwise.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors for plaintiff: *Shaen, Roscoe & Co.*
Solicitor for defendants: *J. H. Pawlyn.*

A. W. G.

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(1) [1947] K. B. 860

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Mar. 8, 9, 10, 21.

Tucker, Asquith and Singleton L.JJ.

EDWARDS *v.* NATIONAL COAL BOARD.

Coal mine—Fall of side of travelling road—Fatal injuries to workman—Breach of statutory duty to make secure—Whether "reasonably "practicable"—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50) *ss.* 49 *and* 102, *sub-s.* 8.

A colliery timberman, while walking along a travelling road in a South Wales coal mine, in the course of his duties, was killed by the fall of a considerable portion of the side of the road. The plaintiff, his widow, claimed damages from the National Coal Board, as owners and occupiers of the mine, for breach of their statutory duty under s. 49 of the Coal Mines Act, 1911, to make secure the roof and sides of "every travelling road and working "place." The defendants contended that having regard to the impossibility of knowing when and where a fall was likely to occur and to the expense and labour and other difficulties involved in propping and lining the sides of every travelling road in all their mines, it was "not reasonably practicable to avoid a breach" of s. 49, and therefore they were excused from liability by s. 102, sub-s. 8, of the Act.

Held, that in every case the risk of accident had to be weighed against the measures necessary to eliminate the risk. The greater the risk the less would be the weight to be given to the factor of cost. That s. 49 imposed an absolute duty on the mine-owners, and the onus rested on them of proving it was not reasonably practicable to discharge that duty; but that having called no evidence to assist the court to visualize the situation nationally from the viewpoint of the monopoly owner, and admittedly never having considered the matter from the local angle, the defendants had failed to establish their defence under s. 102, sub-s. 8.

Decision of Hallett J. reversed.

APPEAL from Hallett J.

On November 6, 1947, Joseph Edwards, a colliery timberman, was walking along a travelling road called Pitt's Level in No. 2 pit, Marine Colliery, in South Wales, when he was killed by the fall of a considerable portion of the side of the roadway. The fall was due to a latent defect, known as a "glassy slant" in the strata (hard, shiny and slippery material which does not bind properly with the adjacent material) which is likely to slide off if pressure from any quarter is put upon it. The slant in fact was a fossilized tree.

The plaintiff, the widow of the deceased workman, brought an action against the defendants, as owners and occupiers of the mine, for damages (1.) under the Fatal Accidents Act, based on breach of duty at common law to take reasonable care, and (2.) under s. 49 of the Coal Mines Act, 1911 (1), for breach of their statutory duty to make the side of the travelling road secure. The defendants relied on s. 102, sub-s. 8 (1), of the Act, contending that it was not reasonably practicable to avoid a breach of the duty.

Hallett J., before whom the case was tried at Monmouth Assizes, gave judgment for the defendants on both counts. He rejected the plaintiff's contention that the fall was due or contributed to by subsidence or shot firing, and finding that the glassy slant could not have been detected by examination, and its existence was not to be expected, he acquitted the defendants of negligence at common law. On the other issue he held that it was not reasonably practicable for the defendants to deal with eventualities by propping and lining throughout the roads of their mines, and he was not satisfied on the evidence that there was any special reason why they should prop or line at the spot where the accident occurred. The defendants were therefore entitled to the protection of s. 102, sub-s. 8. The plaintiff appealed.

Havers K.C. and *Ryder Richardson* for plaintiff. The main issue for determination is the true construction of s. 49 and s. 102, sub-s. 8, and their application to the facts of this case. Sub-section 8 provides a loophole of escape for the mine-owner who has not discharged his statutory duty. The only ground of defence put forward before the learned judge was that it was not reasonably practicable for the Coal Board to support the walls of all the travelling roads in their mines because of the cost, and labour and material involved. It is submitted that those are matters which do not come within the purview of this section. The moment a travelling road is made, the obligation to make it secure arises, and it continues in force as long as the roadway is used as a travelling road. Section 102, sub-s. 8, does not apply where the Coal Board deliberately refrain from supporting the walls for economic reasons. It is only meant to apply where there has been some unforeseen accident or some interference by an unauthorized or irresponsible person, rendering a breach of duty impossible of prevention. These safety provisions are inserted for the protection of persons using the roads and working places. Section 49 imposes an absolute duty on the mine-owner. Parliament must have given consideration to the cost which these protective measures would involve and it is submitted that evidence as to the cost in labour and material would be inadmissible on the issue of reasonable practicability.

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(1) The Coal Mines Act, 1911, s. 49: "The roof and sides of "every travelling road and working place shall be made secure "...."

Section 102, sub-s. 8: "The "owner of a mine shall not "be liable to an action for "damages as for breach of statutory duty in respect of any "contravention of or non-compliance with any of the "provisions of this Act if it is "shown that it was not reasonably "practicable to avoid or prevent "the breach."

[SINGLETON L.J. If it were held that the cost of supporting the walls of all the travelling roads in mines throughout Britain was an element to be taken into consideration, s. 49 would be rendered of no effect.]

Yes. The Coal Board are saying that they are adopting a standard of care of their own. The evidence given clearly establishes that the officials of this particular mine had given no thought at all to their duty under s. 49.

[*Caulfield* v. *P. W. Pickup, Ld.* (1); *Yelland* v. *Powell Duffryn Associated Collieries* (2); *Wales* v. *Thomas* (3); and *Butler* (*or Black*) v. *Fife Coal Co.* (4) referred to.]

Gerald Gardiner K.C. and *R. G. Micklethwait* for defendants. Where the legislature uses general words such as "not "reasonably practicable," without any attempt at definition, it intends that the court shall apply common sense to the circumstances of the case, and it is not correct to say that the court is precluded from taking this or that relevant consideration into account. There is nothing to prevent this court from taking into account expense and the difficulty of obtaining labour and materials. If the learned judge was right in holding that the defendants had no reason to expect danger at the spot where this accident occurred, then the only way in which the defendants could have made this wall secure would have been by securing all the sides of all their travelling roads. If the only practical way of securing this road was by lining and propping all roads, then the trial judge was entitled to say that that would not be reasonably practicable. He was also entitled to take notice of the fact that we are living

(1) [1941] 2 All E. R. 510.
(2) [1941] 1 K. B. 154.
(3) (1885) 16 Q. B. D. 340.
(4) [1912] A. C. 149, 169, 172, 178.

in times of shortage of man-power and materials, and also of the colossal expense involved.

[TUCKER L.J. Go back to 1940, when this road was made, and put yourselves in the position of the mine-owners. It was their duty to make it safe, so far as was reasonably practicable. They knew they were going to make a road 400 yards long. It would have been reasonably practicable to line it. Is it any answer to say: "If we did we should have had to make all the other roads safe by lining"?]

The question for consideration by the court is not whether it was reasonably practicable to line this particular place but whether it was reasonably practicable to prevent the breach, and it would be right for the court to put itself into the position of the party charged with negligence. It would then arrive at the position that it being impossible to tell where a fall is likely to occur the legislature contemplated that it would not be reasonably practicable to line every road.

[TUCKER L.J. That means that s. 49 has no effect.]

No, because you may have a road in which from obvious signs you should anticipate danger.

[*Atkinson* v. *Shaw* (1); *Browning* v. *Crumlin Valley Collieries* (2); *Coltness Iron Co.* v. *Sharp* (3); and *Nichols* v. *Hall* (4) referred to.]

Havers K.C. in reply. This appeal is only concerned with this particular road. The breach means the failure to comply with s. 49 as regards this particular road. The judgment of the learned judge was based on the impracticability for the Coal Board to prop or line all the travelling roads in all their mines. He never directed his mind to the question whether it was reasonably practicable to line this particular road. In fact part of the road has been lined. The standard of care was fixed at the date when the Act was passed and cannot be varied because of the number of mines which an owner has acquired. If the court takes into account the economic basis it must also take into account the number of miners for whose safety these provisions are enacted.

Cur. adv. vult.

March 21. TUCKER L.J., having stated the facts and intimated his agreement with the findings of the learned judge on the issue of negligence at common law, continued: The claim based on breach of statutory duty depends on the proper interpretation of s. 49 and s. 102, sub-s. 8, of the Coal Mines Act, 1911, read together, and the application thereof to the facts proved and evidence given in the court below.

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(1) [1915] 2 K. B. 768.

(2) [1926] 1 K. B. 522, 534.

(3) [1938] A. C. 90.

(4) (1873) 4 R. 8 C. P. 322.

Hallett J. dealt with this issue in these words: "I get "back to the broad question which is the question that "throughout this case I have felt to be the difficult one, "whether, if there is no reason to suppose that the particular "place requires propping or lining—and I think lining would "be necessary for complete security, though propping might "produce security—it can be said it is reasonably practicable "for the National Coal Board to prop or line everywhere "in their pits, regardless of whether there is any particular "reason for propping or lining at that particular point. "It is not a point on which I confess I feel certain, as I do "sometimes about questions of fact and questions of law, "but upon the whole I feel myself that I am satisfied by "the defendants that it is not reasonably practicable for "them to prop or line every place in their pits irrespective "of whether there is any reason to suppose that propping or "lining is necessary at that particular point. I want to make "it quite plain. It might be a technical matter, but, as I "understand it, a travelling road, as far as falls are concerned, "will be made more secure if it is propped and lined. There "may be other reasons possibly against it, but, so far as falls "are concerned, I think it is plain even to a layman that it "will be made more secure, and that in a case where there "is some abnormality present which may cause a fall, that "fall may be prevented by propping and lining, and it does "not seem that it is reasonably practicable for the National "Coal Board to deal with eventualities by propping and lining "throughout, and I am not at all satisfied on the evidence "here that there was any special reason why they should prop "or line at that particular point."

There is no dispute that the joint effect of ss. 49 and 102, sub-s. 8, is to impose upon the mine-owner the absolute duty to make the roof and sides of every travelling road secure, and that he can only escape civil liability for breach of this duty if he can prove—the onus is on him—that it was not reasonably practicable to avoid or prevent the breach. It is also conceded that the deceased man's death was caused by the insecurity of the travelling road in which he was working. Consequently, the defendants can only escape liability by proof that it was not reasonably practicable for them to avoid or prevent this insecurity. It is contended by the defendants that it was not reasonably practicable for them to do so because there was nothing to indicate the existence of this latent defect, and that to expect them to prop and/or line every road in every mine would be to impose on them an altogether impossible burden. They concede that if any travelling road is known to be insecure, or if there is reasonable ground to fear insecurity, then they cannot escape the consequences of failure to make it secure, save possibly in very exceptional circumstances. In short, it is not reasonably practicable to prop or line every roadway, including those which are in fact perfectly safe, in case somewhere there may be some unknown and unascertainable defects. On the other hand, counsel for the plaintiff argues that nothing short of some external interference by some unauthorized third person, or some occurrence which could not reasonably be anticipated, can excuse the breach of the absolute duty. He says that matters which are within the control of the mine-owner, such as cost, inconvenience and loss of profits, are irrelevant. Alternatively, he submits that if such matters as cost, labour and materials can be considered, the court can only look at the particular roadway in which the accident happened, and that the defendants have given no evidence on this point sufficient to discharge the onus that lay upon them.

I cannot accept the submissions of either side in their entirety. The defendants' contention appears to me to leave the miner no better off than he was at common law. In effect, it makes the taking of reasonable care the sole test. On the other hand, though no doubt it is necessary to look primarily at the particular part of the particular mine with which the court is concerned, it is, in my opinion, necessary and proper to view it in relation to the totality of obligations resting on the mine-owner. For example, vesting day having been January 1, 1947, and an accident taking place the following November, due to the insecurity of the sides or roof of a travelling road, it would, I think, be permissible for the National Coal Board to lead evidence that it had a scheme or plan for rendering all such roads secure, that certain areas had priority, and that it was not reasonably practicable for them to have carried out the remedial work at the particular pit by the time of the accident. Again, they might prove that in some areas no propping or lining was necessary, for some particular reason, or that different methods were required in some localities. Dealing with the particular latent defect which caused this accident—a glassy slant—it might perhaps have been possible to show that they are more common in some formations and areas than others, or that they are non-existent in some places. I know not. But this is the kind of evidence which, in my opinion, would have been relevant. It would, of course, always be relevant to show that for some reason peculiar to the particular place in question, the proposed method was not reasonably practicable. I do not hold the view that cost must necessarily always be excluded as an element to be weighed in the balance. In *Coltness Iron Company* v. *Sharp* (1), Lord Atkin said: "The time of non-"protection is so short, and the time, trouble and expense "of any other form of protection is so disproportionate that "I think the defence is proved." This shows that in every case it is the risk that has to be weighed against the measures necessary to eliminate the risk. The greater the risk, no doubt, the less will be the weight to be given to the factor of cost.

I turn to consider how the defendants in the present case sought to discharge the onus of proof that lay upon them. It was, I think, a heavy burden. They occupied a position between that of an absolute insurer and the ordinary occupier of property, but they start as insurers, and have by evidence to divest themselves of this status. They called no witness qualified to assist the court to visualize the situation nationally from the viewpoint of the monopoly owner. We are therefore left in ignorance as to the practicability or otherwise of the measures which, in the opinion expressed by the Inspector of Mines appointed by the National Union of Mineworkers, after twelve years' experience of the investigation of fatal accidents, constitutes the only way to ensure security viz., artificially to support all roads in mines. According to his evidence, which stood uncontradicted, more than half of the existing roads are already artificially supported. It is, of course, obvious that to give artificial support to the remainder would be a very considerable and expensive operation, which could not be carried out all at once. The court would not require evidence to that effect, but whether it is reasonably practicable as a long term plan, or should already have been

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(1) [1938] A. C. 90, 94.

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begun, I know not, nor can I understand how any court can judge of these matters without evidence. I do not therefore think the defendants got any distance towards proving that security was not reasonably practicable from the viewpoint of the totality of the Board's obligations. So far as the situation falls to be considered solely from the local angle, the evidence of the defendants' officials on the spot shows that they had never even applied their minds to the point until questioned in court. Mr. Wakeley, the under-manager, said: "I have never gone into the matter." He then proceeded to express the view that the labour involved would make it impracticable to carry out this work in the miles of roadways where it would be required. Whether he was referring to all the roads throughout the country, as to which he was clearly not qualified to speak, or was confining himself to this particular mine, is not clear, but neither he nor the manager gave the court any figures as to cost or labour necessary to prop and/or line this particular travelling road, which was only 400 yards long, and which had, in fact, been timbered for about half its length, and up to within 15 to 30 yards of the spot where this accident occurred.

Although the learned judge has found that the fall was not due to subsidence or shot firing, it is the fact that weaknesses had appeared at places from time to time in the sides of this road, and they had been timbered up as they appeared. Furthermore, there was undisputed evidence that glassy slants had been seen in this roadway, though they were rare. The road had only been in existence for some seven years. In truth and in fact the defendants' officials never applied their minds to their absolute obligation under s. 49; they were content to rely on the system of inspections, and on the observance of the ordinary and usual precautions. That was their whole case as presented in argument, and it was said that that was the true measure of reasonable practicability under s. 102, sub-s. 8. In my view, the evidence in this case falls short of what is required to discharge the burden that lies upon a defendant under that section in a case where there has been a clear breach of statutory duty under s. 49. My decision is, of course, confined to the facts of this particular case, and whether or not sufficient evidence to warrant a decision in favour of the defendants may be presented to the court in other cases in the future, is a matter with which we are not concerned.

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I would accordingly allow this appeal and enter judgment for the plaintiff for the sum of 984*l.*, being the learned judge's provisional assessment of damages.

Asquith L.J. I agree. The onus was on the defendants to establish that it was not reasonably practicable in this case for them to have prevented a breach of s. 49. The construction placed by Lord Atkin on the words "reasonably practicable" in *Coltness Iron Co.* v. *Sharp* (1) seems to me, with respect, right. "Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them—the risk being insignificant in relation to the sacrifice—the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident. The questions he has to answer are: (a) What measures are necessary and sufficient to prevent any breach of s. 49? (b) Are these measures reasonably practicable? In the particular type of accident caused by a "glassy slant" it is admittedly impossible before the event to foresee at all, at what place or in what roadway or in what mine, such an accident would occur. The argument that the owners could and should have made secure the particular roadway in which, as things fell out, the glassy slant declared its presence, without having to make secure every other roadway in which it might have done so, assumes that the owners could by some process of divination, have predicted that the accident was likely to occur in the particular roadway in which it did, rather than elsewhere. But an owner who is not gifted with second sight can make no such prediction; and without it, security against this peril can only be secured by extending similar security measures to all roadways. Only so can he prevent breaches of s. 49 due to glassy slants.

So far, I am inclined to agree with the learned judge. But, like my Lord, I do not think any or any sufficient evidence was adduced as to the relative quantum of risk and sacrifice involved, on the basis either that the mines as a whole, or this particular roadway, should be taken as the unit—a necessary prerequisite to any decision that the defendants have proved the necessary measures impracticable. For these reasons I think the appeal should be allowed.

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(1) [1938] A. C. 90, 94.

SINGLETON L.J. Joseph Edwards was employed by the defendants as a colliery timberman, at No. 2 pit, Marine Colliery. On November 6, 1947, he was going to his work along Pitt's Level (a travelling road) when he was killed by a fall of material from the side of the road. Section 49 of the Coal Mines Act, 1911, provides that: "The roof and sides "of every travelling road and working place shall be made "secure . . . ." If the side of the travelling road had been made secure, the fall would not have taken place. In answer to the action brought by Mrs. Edwards, the widow, the defendants rely on s. 102, sub-s. 8 of the Act, which provides that the owner of a mine shall not be liable to an action for damages as in breach of a statutory duty . . . . if it is shown that it was not reasonably practicable to avoid or prevent the breach. The breach was in not making, or in failure to make, the side of the travelling road secure, and the defendants set out to show that it was not reasonably practicable for them to avoid this. The words "to avoid or prevent" are not very well chosen to cover a breach of this kind.

The road was about 400 yards in length, and had been commenced in 1940. The defendants' case was that the walls and sides of Pitt's Level were very strong and firm. A witness described the side in question as a firm and solid wall. The manager of the colliery said that the sides consisted of very hard fireclay, and when asked if they were safe unsupported, he replied: "All these questions are relative. As a mining "man, I say it is one of the safest conditions possible under-"ground." There had been some subsidence which had weakened the sides in parts, and in those parts or places, the defendants (or their predecessors) secured the wall by putting up timber in one form or another, as and when the weakness was detected. In the result, about half of this roadway was timbered, and the other half was left without any timbering or support. The defendants were content to regard the road as safe in parts at which no sign of weakness was seen on inspection, and the place at which the fall took place on November 6, 1947, was a place at which nothing had been done towards making the sides secure. It is not now contended that it was secure, or that anything had been done to make it secure at this point. It was said that timber support had been provided some thirty yards away (the defendants' suggestion was fifteen yards away).

The defendants' submission was that if this side of this travelling road had to be supported or made secure along the whole of its length, it followed that every roof and every other side of every travelling road in every mine to which the Act of 1911 applies, must be similarly supported, so as to render it secure, and that that was not reasonably practicable. Hallett J. accepted this submission and held that the defendants were not liable to an action for damages by reason of s. 102, sub-s. 8. With all respect, I do not think that this is the right test. The sides of this travelling road had not been made secure, and in the result Edwards was killed. It was for the defendants to show that it was not reasonably practicable to make secure the side of the road, a portion of which fell, and in my judgment they failed to do that. It can be no answer to an action in which damages are claimed to say: "We did not do anything at such and such a place because "we considered that point secure," nor can it be an answer to say: "If we do something at this place we shall have to "do something in many other places and in many other "mines." Nor, again, can it be an answer to say: "We did "not expect a fault of this kind, nor a fall, at this place." There is a breach in every case in which the roof and sides of a travelling road have not been made secure: the owners can escape paying damages in a civil action if they bring themselves within the terms of s. 102, sub-s. 8.

It is true to say that if the National Coal Board have to make secure the roofs and sides of every travelling road a heavy burden will be placed upon them. Hallett J. said it would be a stupendous undertaking. I do not think the court is concerned with that: indeed, it seems to have been the practice in some cases, in which it has been considered that roof and sides are safe, to take the risk of a civil action. Part II. of the Act contains many provisions as to safety. Section 49 places an absolute obligation on the owners. That can only be altered by Parliament. In some sections of that part of the Act, the Secretary of State is empowered to grant relief from certain provisions, and this raises the question whether cost and expense can be used to establish that it is not reasonably practicable to avoid or prevent a breach. Prima facie, I should have thought that the words when applied to the absolute obligation imposed by s. 49 were intended to cover a case in which everything reasonably possible had been done to make roof and sides secure, but through a fault, or the like, something happened and an accident took place. In such a case the defendants might well be able to establish that it was not reasonably practicable to comply with the provisions of s. 49.

Though it is by no means clear how far expense was considered as an element in *Coltness Iron Co.* v. *Sharp* (1), I think the words of Lord Atkin form a most useful guide: " . . . . I am unable to take the view that it was reasonably " practicable by any means to avoid or prevent the breach " of s. 55. The time of non-protection is so short, and the time, " trouble and expense of any other form of protection is so " disproportionate that I think the defence is proved." In the present case, the time, trouble and expense involved must be examined in relation to the road on which the fall took place. The owners had taken steps to secure the sides along one half of its length approximately. I see no reason why the whole length could not have been similarly secured as and when the road was being made. There is no evidence at all to show that it would not have been reasonably practicable to do this, nor is there any evidence to show that it would not have been reasonably practicable to do it a month before the accident. If the defence now raised had been put forward by a private owner before the Coal Industry Nationalization Act, 1946, I do not think that it would have held water for a moment, and I am not satisfied that the National Coal Board can claim to be in a better position than a private owner would have been in with regard to safety provisions of the Act of 1911.

Some evidence was given to show the magnitude of the task if the roof and sides of every travelling road everywhere had to be made secure, but no evidence was directed to show what it would mean, or would have meant, in regard to this particular road. The mining engineer who was called on behalf of the defendants was not asked any question on this subject: he did not visit the colliery until October 8, 1948. In the course of his judgment Hallett J. said: " Upon the whole " I feel myself that I am satisfied by the defendants that it " is not reasonably practicable for them to prop or line every " place in their pits, irrespective of whether there is any

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(1) [1938] A. C. 90, 94.

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"reason to suppose the propping or lining is necessary at "that particular point." It seems to me that that approach fails to give effect to the statutory duty imposed by s. 49. The owners had done what they thought necessary to secure (or to make secure) the sides of this road in some parts: they failed to show that it was not reasonably practicable for them to do so in other parts, and, in particular, at the point at which the fall took place. In those circumstances they do not come within the terms of s. 102, sub-s. 8.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Theodore Goddard & Co. for T. S. Edwards & Son, Newport.*

Solicitors for defendants: *Preston, Lane-Claypon & O'Kelly for Colborne, Coulman & Lawrence, Newport.*

A. W. G.

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Feb. 2.

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HALL *v.* BECKENHAM CORPORATION.

Local Government—Public recreation ground—Nature of occupation by local authority—Dedication—Public use—Noise by flying of model aircraft—Action for nuisance by occupier of adjoining house—Liability of authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 164.

A local authority had the management and control of a recreation ground which they had acquired under s. 164 of the Public Health Act, 1875. The ground was closed to the public at night and on certain days. Members of the public using the ground had formed the practice of flying model aircraft there which, being fitted with internal combustion engines, made a considerable noise. The practice was not contrary to any by-law issued by the authority. The plaintiff, who resided in a house adjoining the recreation ground, brought an action against the authority alleging that the noise of the aircraft constituted a nuisance and claiming damages and an injunction. The authority contended that the action would not lie against them, and that question was set down for trial as a preliminary point of law.

Held, that the local authority were not in occupation of the recreation ground, but merely its custodians or trustees on behalf of the public, to whose use it was dedicated, on the principle laid down in *Lambeth Overseers* v. *London County Council* [1897] A. C.

625, which principle was applicable notwithstanding that the local authority were empowered by s. 163 of the Local Government Act, 1933, and by s. 42, sub-s. 1, of the Town and Country Planning Act, 1947, to appropriate the land, with the consent of the Minister concerned, to certain uses other than that for which it was acquired; that the ground was not the less dedicated to the use of the public because it was closed by the local authority at night and on certain days so that the public's right of access to it was to that extent restricted; that, as the local authority were accordingly not in the position of a private occupier of the land, no action lay against them in respect of a nuisance, if any, created by members of the public on it; that while, as persons having statutory powers of control and management of the recreation ground, the authority might be liable for a nuisance created on the land which they had power, but failed, to abate, their powers of restraint over the public in the ground were confined to contravention of the general law or their own by-laws, neither of which operated to prohibit the flying of model aircraft; and that the authority were accordingly not liable at the suit of the plaintiff either as occupiers of the land or as persons who had power, but had failed, to abate the alleged nuisance.

Lambeth Overseers v. *London County Council* [1897] A. C. 625 applied. *North Riding County Valuation Committee* v. *Redcar Corporation* [1943] K. B. 114 distinguished.

PRELIMINARY point of law set down for argument under R. S. C., Or. 25, r. 2.

The plaintiff lived in a house near a public pleasure ground called the Blake Recreation Ground, which was under the control and management of the defendants, Beckenham Corporation. Members of the public had acquired the habit of flying model aircraft on the ground. Latterly the model aircraft, instead of being comparatively harmless and quiet because driven by elastic, came to be fitted with internal combustion engines which, having no silencers, made a considerable noise. The plaintiff brought an action against the corporation for damages in respect of the nuisance caused by that excessive noise, claiming an injunction to prevent its recurrence, but the corporation raised the preliminary point, which was now argued, that, however well founded the plaintiff's complaint in fact, he had no remedy against them.

Squibb for the corporation. The local authority in a case like this are merely the custodians of the recreation ground on behalf of the public. The rights involved are those of the public. The local authority can do nothing to interfere with those rights unless they are expressly authorized, by statute or by duly approved by-law, to do so. The position generally and the rights of a local authority in respect of public pleasure grounds were before the court in *Attorney-General* v. *Sunderland Corporation* (1) and *Lambeth Overseers* v. *London County Council* (2). As Lord Atkinson pointed out in *Glasgow Corporation* v. *Taylor* (3), the local authority are bound to permit their gardens to be used as a public park open to all members of the public, including even children unattended by persons capable of looking after them. The public have the right to go into public recreation grounds in order to enjoy themselves according to their own ideas of enjoyment, subject only to their not infringing any by-laws, which are made under s. 164 of the Public Health Act, 1875. It is admitted here that these model aircraft are operated by members of the public in exercise of their right to do so. Of course the rights which the operators of the aircraft have, as members of the public, against the corporation do not entitle them to do things which are a nuisance to other members of the public. It may well be that the plaintiff has a good cause of action against those who, he says, interfere with the comfort and amenities of his home. There may be difficulty in tracking these people down and bringing proceedings against them, and obviously the local authority are a more substantial opponent; but the plaintiff is not without legal rights in the matter. The question is against whom they can be enforced. Since the local authority have no power to stop these people from flying their aircraft they cannot be said to cause or permit any nuisance which is said to arise from that activity, and the plaintiff is not entitled to any relief as against them. A local authority are clearly not entitled to cause or permit a nuisance. But if someone has a right as against them to go into a public recreation ground which is vested in them as trustees, they cannot be said to cause or permit what that person does in the ground.

When an authority use land in execution of their statutory powers, an action will not lie against them at the suit of a person injured thereby unless they execute the powers in an improper way. The statute in question may provide for compensation of persons injured by the exercise of the powers, in which event it is to the compensation provisions, and to

(1) (1875) 2 Ch. D. 634.

(2) [1897] A. C. 625.

(3) [1922] 1 A. C. 44, 51.

them alone, that those persons must look for their remedy. The general principles affecting liability for nuisance are referred to by Lord Porter in *Longhurst* v. *Metropolitan Water Board* (1). It is not suggested here that the corporation have been guilty of negligence or any form of misfeasance. What has been done to give the plaintiff cause for complaint has been done by third parties. There is no basis for an action against the corporation in respect of that. Even if the main contention is wrong, namely, that the corporation are merely the custodians of this ground without power to stop people from flying the model aircraft, they are still not liable in nuisance because they have neither caused the alleged nuisance nor allowed it to arise by any neglect of their duty.

Hackforth Jones for the plaintiff. The corporation are the owners of this ground, and they have the management and control of it. If, as is admitted for the purposes of this case, a nuisance is being committed on this land and the local authority know of it and do not put an end to it after a reasonable time, then, it is submitted, they are liable in nuisance at common law like any other occupier of land. In *Attorney-General* v. *Tod Heatley* (2), an occupier of vacant land was held to be under a common-law duty to prevent it from being so used as to constitute a public nuisance. In *Sedleigh-Denfield* v. *O'Callaghan* (3), the occupier of land was held liable for continuing a nuisance on the land which he had not himself created. Here the corporation have continued the nuisance themselves by doing nothing to stop it after becoming aware of it.

[FINNEMORE J. What do you say they can do about it ?]

They can order these people not to fly their aircraft on this ground.

[FINNEMORE J. What authority have they to say that ?]

It is their land. As its owners they can stop these activities. The mere absence of a by-law covering the activities does not mean that they cannot stop them. [Viscount Maugham's speech in *Sedleigh-Denfield* v. *O'Callaghan* (4) referred to.] The persons who are the actual and effective cause of this nuisance are licensees of the corporation : see *Glasgow Corporation* v. *Taylor* (5) and *Sutton* v. *Bootle Corporation* (6).

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(1) (1948) 112 J. P. 470, 475.

(2) [1897] 1 Ch. 560.

(3) [1940] A. C. 880.

(4) Ibid. 894.

(5) [1922] 1 A. C. 44.

(6) [1947] K. B. 359.

The corporation are accordingly liable for the nuisance which they commit. In *White* v. *Jameson* (1) it was held that, where the occupier of land grants a licence to another to do certain acts on the land, and the licensee in so doing them commits a nuisance, the occupier may be made a defendant to an action to restrain the nuisance. [Opinion of Lord Atkin in *Sedleigh-Denfield* v. *O'Callaghan* (2) referred to.]

That being the position at common law, it remains to consider the argument that because the corporation occupy the land under statutory powers they are protected from liability. Section 164 of the Public Health Act, 1875, which is concerned here, provides that a local authority "may . . . . "maintain lands for the purpose of being used as public walks "or pleasure grounds . . . ." By necessary implication, if there is to be maintenance there must be control. Control of the ground is implicit in the statutory power here given. It cannot, surely, be said that that section authorizes the commission of a nuisance on the land? It is argued that s. 164 implicitly places on local authorities the duty to allow the public to recreate themselves in a public pleasure ground. The argument advanced in this case is in effect that the authority must allow the public to recreate themselves and to commit a nuisance in the ground. A statute can only authorize the commission of a nuisance expressly or by necessary implication, for example, if there is only one way in which they can do an act authorized by statute. The corporation are in occupation of this ground; they are responsible for its maintenance and control; and, therefore, on the principles applicable to a personal occupier of land, they are responsible for a nuisance on their land by whomsoever committed. The difficulty, however great, of abating the nuisance affords the occupier no answer: see *Attorney-General* v. *Tod Heatley* (3).

In *North Riding County Valuation Committee* v. *Redcar Corporation* (4) Viscount Caldecote C.J. observed that the basic principle of the decision in *Lambeth Overseers* v. *London County Council* (5) was that the county council were merely custodians and trustees to hold and manage the ground in question for the use of the public, were incapable by law of making any profitable use of the ground, and bound to allow the public free and unrestricted use of it. Here the corporation are not so bound: the public have not unrestricted use of this recreation ground, equipped as it is with gates for their exclusion which the corporation can make use of by way of exercising the control which is inherent in their statutory power to maintain the ground.

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(1) (1874) L. R. 18 Eq. 303.
(2) [1940] A. C. 899.
(3) [1897] 1 Ch. 560.
(4) [1943] K. B. 114, 129.
(5) [1897] A. C. 625.

In *North Riding Valuation Committee* v. *Redcar Corporation* (1) it was decided that land acquired by a local authority under s. 164 of the Public Health Act, 1875, was in the beneficial occupation of the local authority for rating purposes and, therefore, not dedicated to the use of the public. This ground is of value to Beckenham Corporation because they have power to lease or exchange it or to erect buildings on it. They are expressly given by s. 163 of the Local Government Act, 1933, power to appropriate for new purposes land no longer needed for the purpose for which it was acquired. A ground acquired under s. 164 of the Act of 1875 is not in the same position as Brockwell Park (concerned in *Lambeth Overseers* v. *London County Council* (2)), which was acquired by London County Council under the London County (General Powers) Act, 1890. If Beckenham Corporation are right in their contention they have no power to prevent people from creating a nuisance in the entrance to the town hall or a museum. This case, like the *Redcar* case (1), differs from *Lambeth Overseers* v. *London County Council* (2) because the recreation ground here is capable of profitable use.

[FINNEMORE J. Does not land acquired under s. 164 of the Act of 1875 have to be used for public walks, etc. ?]

Yes, unless the corporation are minded to do other things with it under other statutory powers. The fact that such other powers can be exercised in respect of this land shews that it is not dedicated to the use of the public.

[FINNEMORE J. They are only empowered to make other use of the land if it is no longer required for its present purpose.]

This land is still of some value to the corporation. Therefore they are in beneficial occupation of it and under a consequent duty to prevent the commission of a nuisance on it. By s. 42, sub-s. 1, of the Town and Country Planning Act, 1947, local authorities are given power to appropriate land for certain purposes. That is an example of the way in which the corporation here might be able to make use of this recreation ground though it was acquired under s. 164 of the Act of 1875.

(1) [1943] K. B. 114.

(2) [1897] A. C. 625.

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So long as the corporation hold the land only under the powers under which they acquired it, they can make no different use of it; but that does not mean that they will never be able to make such a different use. *Tyne Improvement Commissioners* v. *Imrie* (1) shews that interruption of the rights of the public to use land for recreation is sufficient to prevent an absolute dedication of the land to the public for that purpose. Similarly, the rights of control possessed by the corporation over this ground are sufficient to prevent absolute dedication of it to the public If the argument for the corporation is right a child can go into this recreation ground and fire off a noisy gun, just as it can fly a noisy model aircraft, and the corporation cannot stop him. But the fact, if it be so, that the public have such right as against the corporation does not entitle the latter to override the private rights of individuals injured by the nuisance, for it is neither expressly nor impliedly authorized to commit the nuisance. If the corporation cannot now stop what is going on, it is always open to them to seek approval of a new by-law by which to stop it.

Squibb, in reply. If the corporation permitted a nuisance on this ground by failing to take such steps to stop it as they were lawfully entitled to take, then they would be liable at the suit of the plaintiff.

[FINNEMORE J. Do you say that, if a person went into this ground with an aeroplane and made shocking noises with it, the corporation could not stop him?]

It is submitted that they could not. Admittedly they have the management and control of the ground; but that only means management and control subject to the statute under which they acquired the ground. Then, management and control does not necessarily extend to the exclusion of the committing of a nuisance. Once a ground is held by a local authority for public walks and for the purposes of a public pleasure ground, the public have the right to enter it for the enjoyment of those things, subject only to their not contravening any by-laws. Until the land is let or sold, it remains a public pleasure ground over which the public have their rights. Authority was cited for the plaintiff to show that the occupier of land is liable for a nuisance created on it by a licensee or a trespasser; but the public are neither trespassers nor licensees on this ground. *Glasgow Corporation* v. *Taylor* (1) and *Sutton* v. *Bootle Corporation* (2) do not decide that the public are licensees in a public pleasure ground, but only that the duty owed to them by the local authority is the same as that owed to licensees: and see per Lord Sumner in *Glasgow Corporation* v. *Taylor* (3). *North Riding Valuation Committee* v. *Redcar Corporation* (4), in no way detracts from the principle laid down in *Lambeth Overseers* v. *London County Council* (5). The former case is peculiar on its own facts. Redcar Corporation were using parts of the hereditament in question for money-making purposes, and those parts were singled out for rating. The corporation here are doing nothing like that. They have not to satisfy the court, for the purposes of this case, that they are not in rateable occupation of the ground. *Lambeth Overseers* v. *London County Council* (5) is only relied on for the proposition that a local authority holding land as a public park hold it as custodians for the public. The only way in which the corporation can restrict the rights of the public in this ground is by means of a by-law or statutory power. Admittedly there is no general by-law under which the corporation can act in this matter. Until the Home Secretary confirms a by-law which applies to this activity, there is no means by which the corporation can stop the flying of these model aircraft.

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(1) (1899) 81 L. T. 174.

FINNEMORE J. This case raises interesting points by no means easy to decide. The corporation contend that if the plaintiff proves the alleged nuisance he has a remedy against the perpetrators, but that they, the corporation, are not responsible.

It is argued for the plaintiff that the corporation are the occupiers of the recreation ground; that, although the nuisance is being caused there by other people, they, the corporation, must so manage and control their property that no nuisance is committed on it; and that if a nuisance is created by other people, even trespassers, the corporation are at common law responsible in damages. That argument addressed to a private individual would be right, having regard to *Attorney-General* v. *Tod Heatley* (6) and *Sedleigh-Denfield* v.

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(1) [1922] 1 A. C. 44.
(2) [1947] K. B. 359.
(3) [1922] 1 A. C. 64.
(4) [1943] K. B. 114.
(5) [1897] A. C. 625.
(6) [1897] 1 Ch. 560.

O'Callaghan (1). The reason is plain: an owner of private property can prevent people from coming on to his land and committing a nuisance there. The argument for the plaintiff is that the corporation are in exactly the same position: they are the owners and the occupiers of this land, and certainly have the management and control of it; and if other people, licensees counsel would call them, create a nuisance in that park and the corporation do nothing about it, they, as occupiers, and in any event as managers and controllers, are responsible, at any rate unless they take reasonable steps to stop it.

The park was established as a recreation ground under s. 164 of the Public Health Act, 1875, which provides: "Any "urban authority may purchase or take on lease lay out plant "improve and maintain lands for the purpose of being used "as public walks or pleasure grounds, and may support or "contribute to the support of public walks or pleasure grounds "provided by any person whomsoever. Any urban authority "may make by-laws for the regulation of any such public "walk or pleasure ground, and may by such by-laws provide "for the removal from such public walk or pleasure ground "of any person infringing any such by-law by any officer of "the urban authority or constable."

The first point taken for the corporation is that in the strict sense the corporation are not the occupiers of the park at all, certainly not occupiers for rating purposes; and in support of this proposition, counsel cited *Lambeth Overseers* v. *London County Council* (2). London County Council, under the London Council (General Powers) Act, 1890, had acquired Brockwell Park for the perpetual use by the public for exercise and recreation, and it was held that they were not liable to the poor-rate in respect of the park. Lord Halsbury L.C. stating the grounds on which he arrived at that conclusion, said (3): "The fact that the park is vested in the county "council does not make them the occupiers. It would be "absurd to contend that wherever the legal estate is there "is occupation. A road is vested in someone, but, if a "public road, there is no occupation of it any more than "of a milestone or a direction-post. I have hitherto "dealt only with the question of occupation, and, as I "have said, I think there is no occupation at all, the county "council being merely custodians and trustees for the

(1) [1940] A. C. 880.

(2) [1897] A. C. 625.

(3) Ibid. 630.

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" public . . . . Once it has been found, as in this case, that " the occupation cannot as a matter of law be a beneficial " occupation, there is an end of the question. I say as matter " of law, because that it does not give a beneficial occupation " as matter of fact is nothing to the purpose. Here there is " no possibility of beneficial occupation to the county council; " they are incapable by law of using it for any profitable " purpose; they must allow the public the free and unrestricted " use of it."

The contention for the plaintiff is that by s. 163 of the Local Government Act, 1933, any land belonging to a local authority and not occupied for the purpose for which it was acquired may be appropriated for any other purpose approved by the Minister for which the local authority are authorized to acquire land. Counsel also quoted s. 42, sub-s. 1, of the Town and Country Planning Act, 1947, and argued that as now, under those Acts, with the permission of the Minister, Blake Recreation Ground might, in certain circumstances, be used by the council for some other purpose, which might be a profitable one, the ratio decidendi of *Lambeth Overseers* v. *London County Council* (1) no longer applies. On that point counsel for the plaintiff also referred to *North Riding County Valuation Committee* v. *Redcar Corporation* (2). There the local authority bought an area of foreshore consisting of sand dunes to be used as public walks and pleasure grounds, and on a part of the property so acquired they set up baths, a bathing pool, a boating lake, a putting golf course, a car park and a pavilion or concert hall. They also let the foreshore in the summer for roundabouts, swings and other amusements, for admission to which they made a charge. It was held that those buildings were in the beneficial occupation of Redcar Corporation and were not merely ancillary to the use by the public of the walks and pleasure grounds in which they were situated. To that extent *Lambeth Overseers* v. *London County Council* (1) was distinguished.

If Mr. Hackforth-Jones' contention were right, *Lambeth Overseers* v. *London County Council* (1) would have to be reconsidered in view of the Acts of 1933 and 1947; but that was not suggested by the Divisional Court which decided the *Redcar* case (2). Indeed, *Lambeth Overseers* v. *London County Council* (1) was referred to and the principle there

(1) [1897] A. C. 625.

(2) [1943] K. B. 114.

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laid down was accepted without question. Tucker J., made this clear, for he said (1): "The inference which I draw "(and I think it almost irresistible) is that there never was "any intention to dedicate these lands exclusively to the "public, that such a dedication never in fact took place, "and that the user of these buildings is not ancillary to the "use of the hereditament as a whole as a pleasure park." I think that that must mean, first, that there may be a pleasure ground which is dedicated to the public use, in which case it is not considered to be in beneficial occupation for rating purposes; and, secondly, that the reason why the particular hereditaments in the *Redcar* case (2) were being rated was because they could not be considered as just ancillary to the use of the pleasure park.

Cassels J., in the same case said (3): "Beneficial occupation "does not mean that pecuniary profit has to be established. "It merely means that there must be an occupation which "is of value to the occupier. There is nothing about any "one of these seven hereditaments which entitles Redcar "Corporation to say that it is not capable of occupation "or that its occupation is of no value, or that it is occupied "by the public who cannot be occupiers for the purpose of "rateability. I hold that Redcar Corporation are in rateable "occupation of these seven hereditaments."

I think that the general conclusion to be drawn is that the Acts of 1933 and 1947 do not alter the position of a local authority with regard to land which it has acquired under s. 164 of the Public Health Act, 1875, for the purpose of public walks or pleasure grounds. It is not for them to decide to turn this land to some other use; that could only be done, as I read the Acts, with the consent of the Minister concerned. So far as a local authority are concerned, if land is bought under s. 164 of the Act of 1875 for that purpose it is dedicated to the use of the public for the purpose of a park. Counsel for the plaintiff points out that on certain days the park in the present case is closed and that it is also closed at night. Therefore, he says, the public do not have unrestricted access to it. Both those circumstances were considered in the cases to which I have referred; but, to my mind, that would not affect what I consider to be the fact, namely, that this

(1) [1943] K. B. 130.
(2) Ibid. 114.
(3) Ibid. 138.

recreation ground was bought or acquired under s. 164 and dedicated to the use of the public as a park.

This does not, however, end the matter, for the defendants, whether or not they are occupiers of the park in the normal sense of the word, are certainly invested with the management and control of it; indeed they concede that by admitting certain allegations in the statement of claim. If further evidence of that be needed, it is provided by the by-laws which the defendants themselves have drawn up in order to regulate the use of this ground so far as they can. I think that the legal position is the same as if they were occupiers. Whether a person occupies land in the strict sense, or has the management and control of it, he must occupy or manage and control it so that it is not a nuisance. In some circumstances a statute may authorize a nuisance, but the fact that something is done by statutory authority does not entitle the person doing it to disregard others' rights, or to create a nuisance to others, unless the Act itself authorizes things to be done which cannot be done otherwise than by creating a nuisance. The position is in such a case accepted that Parliament legislated knowing that it was affecting other people's rights and intending so to do. So long, however, as there is a way of carrying out a statutory obligation, or, particularly, a statutory permission, without affecting other people's rights, that way must be adopted.

Therefore, if the corporation here use, or permit to be used, this recreation ground so that it becomes a nuisance, they will be liable, subject to the question which, to my mind, is decisive of this case—namely, the extent of their powers over this ground. They have the right to make by-laws for its proper conduct, and they have express power, if they make by-laws which are confirmed, to eject from the ground those who infringe them. They have no general right to turn people out because they do not like them, or because they are doing something of which a particular park-keeper may not approve. They can only act against people in the park who offend against their by-laws, or who commit some offence or crime for which criminal action could be taken. It seems plain that if they go beyond those powers their officer, and therefore they themselves, will be liable to an action, for example, for assault or false imprisonment, if they lay hands on someone and forcibly put him outside the park. They can, however, make by-laws, bring them to people's notice, and enforce them. If they refused to enforce their own by-laws and a nuisance were created, it might well be that they would be liable.

What can they do beyond that ? They have certain rights, if people commit offences against the law ; but if a person inside the park, but near a dwelling-house outside, is, by flying a model aircraft, making a great noise by what authority can the park-keeper order him to stop doing so ? If the person concerned demanded to be shown the by-law which forbade the flying of the aircraft in the park the park-keeper could only reply that there was no such by-law. If he protested that the noise was inconveniencing people outside the park, the reply would be that that had nothing to do with the park-keeper and that if someone outside the park complained of a nuisance it was for him to take proceedings against the alleged offender and prove his case. So long as a member of the public behaves himself in the ordinary way, committing no criminal offence and observing the by-laws, the corporation cannot stop his doing what he likes in this recreation ground.

It is this problem which has posed itself to me as being the crux of the case. I have come to the conclusion that Mr. Squibb's argument on this point is right. I think that the corporation are the trustees and guardians of the park, and that they are bound to admit to it any citizen who wishes to enter it within the times when it is open. I do not think that they can interfere with any person in the park unless he breaks the general law or one of their by-laws. They cannot put themselves in the position of judges of whether a person may be causing a nuisance to someone outside the park. Their proper attitude to such a complaint is to say that the complainer must take action against the person who is said to be committing the nuisance.

If the habit of flying these model aeroplanes is becoming a nuisance, the corporation may, and I am told that they have in fact done so, propose a new by-law ; but that is a matter with which I have no concern at the moment. It seems to me that, as things are, anyone who wishes can go into this ground and fly his aeroplane subject to being proceeded against by a person aggrieved if in fact he commits a nuisance. I think that the corporation cannot be sued for this matter, and that the action against them is ill founded. I therefore decide the preliminary point in their favour.

Subject to the opinion of another court, that decision disposes of the whole action, and I formally give judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiff: *Eland, Nettleship & Butt.*
Solicitor for the corporation: *The Town Clerk, Beckenham.*

R. C. C.

GEORGIUS *v.* THE VICE-CHANCELLOR AND DELEGATES OF THE PRESS OF OXFORD UNIVERSITY.

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Jan. 18.

Bucknill and Denning L.JJ.

Defamation—Alleged libel in an annual—The "rolled-up plea"—Defence of fair comment—Interrogatory—"From whom did you "obtain the information?"—Rule of practice in case of newspapers—No such rule in case of other periodicals—Discretion of master or judge in chambers—In exercise, can consider arguments, which produced rule in the case of newspapers.

In an action for damages for an alleged libel, contained in the preface to Crockford's Clerical Directory, an annual publication, the defence was that of fair comment contained in the "rolled-up" plea. The plaintiff applied for leave to administer the following interrogatory to the defendants: "From whom did you obtain "the information?" The master and, then, the judge in chambers refused leave.

Held, on appeal, that there was a rule of practice in the courts that such an interrogatory should not be allowed in the case of newspapers, except in special circumstances. That rule of practice was so well established that the court might prohibit the administering of the interrogatory, were the rule not observed. Apart from the case of newspapers, there was no rule of practice, either way: it was a matter for the discretion of the master or judge in chambers and the only ground on which the court would interfere with his decision would be, if there were some manifest injustice caused by the way in which the discretion had been exercised.

Per BUCKNILL L.J.: He would not like to express a view whether a publication such as Crockford's Clerical Directory came within the special rule protecting newspapers. The judge in chambers was entitled to refuse to allow this interrogatory to be administered on the ground that it was not necessary for the purpose of disposing fairly of the cause or matter. (R. S. C. Or. 31, r. 2). In coming to that conclusion, he was entitled to take into consideration the same sort of argument that apparently led to the formation of the rule of practice which applied in the case of newspapers, for which, see the judgment of Buckley L.J. in *Adam* v. *Fisher* (1914) 110 L. T., at p. 540.

Per Denning L.J.: Crockford's Clerical Directory was not a newspaper. The court had been invited to say that they so disapproved of the rule protecting newspapers that they should confine it strictly to newspapers and, further, state that, in the case of all other publications, the name of the informant should be disclosed. But he (the Lord Justice) did not disapprove of the rule in the case of newspapers and thought that the master or the judge in chambers, when considering other publications, such as reviews, might well, in the exercise of his discretion, have regard to the rule in the case of newspapers.

APPEAL in the interlocutory list.

The plaintiff brought an action against the Vice-Chancellor and Delegates of the Oxford University Press in respect of an alleged libel on him contained in the preface to Crockford's Clerical Directory, 1948, published by the defendants. That directory is published annually and the preface reviews the events of the previous year of interest to those for whom the directory is published. The defence was that of fair comment contained in "the rolled-up plea." The plaintiff applied to administer interrogatories to the defendants asking what information they had at the time they published the passage of which complaint was made, on which they relied, and what steps they took to test it. These interrogatories were allowed. A further interrogatory was applied for: "From whom did you obtain the information on which you "relied in printing or publishing the said expressions of "opinion or any and which of them?" That interrogatory was disallowed first by the master and then, on appeal, by Birkett J., the judge in chambers. The plaintiff appealed.

Stephen Terrell for the plaintiff. This alleged libel was not contained in a newspaper. The rule of practice in the case of newspapers dated from *Hennessy* v. *Wright* (1), which was decided in 1888, and the word "newspaper" was defined in the Newspaper Libel and Registration Act, 1881, and that definition was used in the Law of Libel Amendment Act, 1888. A newspaper must be published periodically or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two of such papers, parts or numbers. Even in the case of newspapers the rule is not without exception as Vaughan Williams L.J. said in *Plymouth Mutual Co-operative and Industrial Society Ld.* v. *Traders Publishing Association Ld.* (1): "It is not necessary to say that the court will never "under any circumstances allow such inspection, but in "the exercise of its discretion it will not, as a general rule, "in the absence of any special rule to the contrary, allow "it" and A. L. Smith L.J. said in *Hope* v. *Brash* (2): "I do "not say that the rule so laid down is one which can never be "departed from, but there must be something exceptional "to take a case out of it."

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(1) (1888) reported in a note to *Parnell* v. *Walter* (1890) 24 Q. B. D. 441.

But Crockford's Clerical Directory is an annual and not a newspaper. No such rule applies to it. The defence here is that the passage complained of consists of fair comment on a matter of public interest. The issue of malice, therefore, is raised, which will defeat such a plea. The name of the informant, therefore, should be disclosed by the defendants, since that is relevant to the issue of malice. There should be uniformity and this interrogatory should be allowed in the case of books and papers other than newspapers, since the answer might be relevant to an issue and is required to dispose fairly of the cause or matter. See R. S. C. Or. 31, r. 2. (*Edmondson* v. *Birch & Co., Ld.* (3); *Lyle-Samuel* v. *Odhams Ld. and others* (4); *South Suburban Co-operative Society Ld.* v. *Orum and others* (5); and *Lawson and Harrison* v. *Odham's Press Ld.* (6) were also cited.)

Beney K.C. and *Marven Everett* for the defendants. This issue for the master and the judge in chambers was one for the exercise of their discretion, whether the alleged libel is or is not contained in a periodical. The rule of practice in the case of newspapers dates further back than 1888, the date of *Hennessey* v. *Wright* (7). See the observations of Buckley L.J. in *Adam* v. *Fisher* (8). We have been unable to find the report of any case where, the judge in chambers having disallowed this interrogatory, the Court of Appeal has allowed it. The judge having exercised his discretion on this issue, to succeed, on appeal, the plaintiff must show

(1) [1906] 1 K. B. 403, 415.
(2) [1897] 2 Q. B. 192–3.
(3) [1905] 2 K. B. 523.
(4) [1920] 1 K. B. 135.
(5) [1937] 2 K. B. 690.
(6) [1949] 1 K. B. 129.
(7) Reported in note to *Parnell* v. *Walter* (1890) 24 Q. B. D. 441.
(8) (1914) 110 L. T. 537, 540.

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that he has exercised it on some wrong ground. The only ground suggested in argument here is that the directory is a yearly publication and not a newspaper; but that does not meet the case. The interrogatory, if allowed and answered, might afford the plaintiff the opportunity for issuing another writ; but that is no ground for allowing this interrogatory to dispose fairly of the cause or matter in this action.

It may well be that the rule of practice extends to such periodicals as a quarterly or an annual. There does not seem any reason for distinguishing newspapers from other periodicals.

Stephen Terrell replied.

BUCKNILL L.J. I will ask Denning L.J. to give the first judgment.

DENNING L.J. The question in this appeal is whether a certain interrogatory should be administered. It arises in the course of a libel action brought against the delegates of the Oxford University Press in respect of a passage in the preface to Crockford's Clerical Directory. Crockford, of course, is published annually and the preface reviews the events of the previous year. The plaintiff says that in that preface he has been libelled. I am not going to read the words complained of. They will have to be considered in the action. All I need say is that the defence is fair comment, pleaded in the "rolled-up plea." In order to make good that defence the publishers will have to prove that the matter was one of public interest, that the facts stated were true, and that the comments were fair. The plaintiff has been allowed to administer interrogatories to the defendants asking what information they had at the time they published the preface, and what steps they took to test it. He has not, however, been allowed to administer the third interrogatory, "From "whom did you obtain the information?" That interrogatory has been disallowed by the master and by the judge, and the plaintiff now appeals to this court from that refusal.

There is a rule of practice in these courts that such an interrogatory is not allowed in the case of newspapers, except in special circumstances. That is a rule of practice which has become so well established that this court might interfere, if it were not observed. Apart from the case of newspapers, there is no rule of practice either way. There is no rule that such an interrogatory should be allowed, or, conversely, should not be allowed. It is a matter for the discretion of the judge. Crockford is not a newspaper; and if the judge here had held himself bound by a rule, and not exercised his own discretion, we might have interfered. But the judge did not do that. He refused the interrogatory in the exercise of his discretion. In those circumstances, this court will not review his discretion: see *Lawson and Harrison* v. *Odham's Press Ld.* (1). The only ground on which the court could interfere would be if there was some manifest injustice caused by the way in which the judge exercised his discretion. Speaking for myself, looking at this case apart altogether from any rule of practice as to newspapers, I see no injustice whatsoever in what the judge has done. The defendants have to prove the facts stated to be true, and the comment to be fair. If the comment, objectively considered, is fair comment, that is, if it is fair when considered without regard to the name of the informant, what is the plaintiff's real object in administering this interrogatory? He seeks to prove the comment to be unfair by saying: "Well, although objectively "considered it is fair, I want to find out the name of the "contributor so as to show that he personally may have "been actuated by malice, because he may have had some "personal spite against me." I see no reason why the plaintiff should be assisted in doing that. If the facts are true and the comment, objectively considered, is fair, he has not much to complain about. His only other object in administering the interrogatory would be to find out the name of the contributor so as to sue him also. But that is not necessary in order to do justice. If he has been libelled, his remedy against the publishers should be sufficient. So, as a matter of discretion, without regard to any rule of practice one way or the other, it seems to me open to a judge, when considering a case where fair comment is pleaded, to say: "I do not think it is necessary "to allow an interrogatory as to the name of the informant." I expect that it was for reasons such as these that the rule grew up in respect of newspapers. Apart from that ground, I should like to say that I see no reason in practice for drawing a distinction between newspapers and monthly, quarterly or annual reviews. We are invited to say here that we so disapprove of the rule protecting newspapers that we should

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(1) Ante, p. 129.

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confine it strictly to newspapers and further state that in all other publications the name of the informant should be disclosed. But I do not disapprove of the rule at all, and I think that the master or the judge in chambers, when considering other publications such as reviews, might well, in the exercise of his discretion, have regard to the rule in respect of newspapers.

In my opinion, therefore, Birkett J. was quite right, and this appeal should fail.

Bucknill L.J. It may be that in some future case an interrogatory such as that which has been disallowed will be necessary for the purpose of coming to a right conclusion in the action. In that event it will be necessary to decide whether a publication such as Crockford's Clerical Directory comes within the special rule about newspapers. I am not prepared to express a view on that point.

I think the learned judge was entitled to disallow this interrogatory on the ground that it is not necessary for the purpose of disposing fairly of the cause or matter and also that when coming to that conclusion, he was entitled to take into consideration the same sort of arguments that apparently led to the formation of the rule which applies in the case of newspapers. They have been adumbrated by Buckley L.J. in *Adam* v. *Fisher* (1), and seem to me to be proper for a judge to consider in a case of this kind. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitor for the plaintiff: *R. Crane.*
Solicitors for the defendants: *Rivington and Son.*

(1) 110 L. T. 540.

C. G. M.

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8. —— *Rent restriction — Furnished letting —"Substantial portion of whole rent"—Percentage of capital value of furniture—Application for repayment of past excess rent—Rent at date of application fixed by rent tribunal—Effect on application—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 9, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*b*)—*Furnished Houses (Rent Control) Act,* 1946 (9 & 10 *Geo.* 6, *c.* 34), *s.* 7.
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9. —— *Rent restriction — House destroyed by enemy action — No abandonment or surrender of tenancy—House rebuilt—Refusal by landlord to admit tenant — Subsequent determination of contractual tenancy by notice to quit—Tenant's right to possession.*
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10. —— *Rent restriction — Lease of flat to limited company—Application to assign to individual—Landlord's refusal due to incidence of Rent Restriction Acts—Whether reasonable. Costs—Premises outside county court jurisdiction—Action in High Court—Defence raising Rent Restriction Acts—Remission of action to county court—Successful plaintiff's right to High Court costs—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 17, *sub-s.* 2—*County Courts Act*, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 48.
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11. —— *Rent restriction — Possession — Flat let at a rent including payment for attendance—Amount attributable to attendance agreed between the parties—Payment as additional rent—Presumption of correctness—Whether substantial portion of the whole rent—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2, *proviso* (i)—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1.
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12. —— *Rent restriction — Standard rent — Rent at material date uneconomic — Special circumstances — Relevance — Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 11.
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13. —— *Rent restriction — Standard rent — Rent reserved by lease—Additional payments reserved by supplemental agreement, recoverable by distress or otherwise as for rent in arrears—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*)—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1, *sch. I.*
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14. —— *Rent restriction — Tenancy of whole house—One room sub-let on furnished tenancy with joint use of another room—Recovery of possession by superior landlord—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2, *proviso* (1.)—*Applicability of Act.*
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15. —— *Rent restrictions — Whether two self-contained flats let together constitute a "separate dwelling-house" — "Rateable "value on appropriate day"—Aggregate rateable values of flats exceed* 100*l.*—*Whether flats controlled by Rent Acts—Rent and Mortgage Interest Restrictions* (*Amendment*) *Act*, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 16, *sub-s.* 1—*Increase of Rent and Mortgage Interest* (*Restrictions*) *Act*, 1938 (1 & 2 *Geo.* 6, *c.* 26), *s.* 7—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1, *s.* 7, *sub-ss.* 1, 3.
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16. —— *Rent restriction — Tenant of London flat also owning house in country where he resided with his family—Detained late in town by exigencies of his business—Sleeping in flat on average two nights a week—Personal occupation of flat.*
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17. —— *Tenant's claim for compensation or new lease—Use of premises for business purposes—Prohibition of business use in head lease—"Could be let"—Effect on right to compensation — Premises "required" for occupation by landlord—Construction—Relevance of landlord's motive — Landlord and Tenant Act*, 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4, 5.
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2. —— *Public recreation ground—Nature of occupation by local authority—Dedication—Public use—Noise by flying of model aircraft—Action for nuisance by occupier of adjoining house—Liability of authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 164.
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3. —— *Superannuation — Officer holding two concurrent appointments—Calculation of superannuation allowance—Local Government Superannuation Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 68), *s.* 3, *sub-ss.* 1, 2; *s.* 8, *sub-ss.* 1, 2, 3, 5, 6, 7; *s.* 10, *sub-ss.* 1, 6; *s.* 12, *sub-ss.* 1, 2; *s.* 27, *sub-s.* 1; *s.* 40, *sub-ss.* 1, 3.
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2. —— *Accident to servant in hoist—Latent defect in winding shaft—Hoist not of "sound material"—Breach of statutory duty—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 22, *sub-s.* 1.
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2. —— *Residential hotel and boarding-house not constituting "an inn"—Notice under Innkeepers' Liability Act,* 1863 *conspicuous in hall—Notice in bedroom: "Proprietors will not hold themselves responsible "for articles lost or stolen, unless handed to "manageress for safe custody"—No exemption from liability for negligence of hotel servants—Contract of guest for indeterminate period, before guest sees notice—Notice not part of contract—Guest hangs bedroom key on key-board in reception office—Key stolen from key-board—Goods stolen from guest's bedroom—Lack of reasonable care by hotel servants—Onus of proof.*
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2. —— *Amendment of valuation list—Building contractor's offices, canteens, and other structures—Actual and exclusive occupation—Rateable occupation—Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-s.* 10.

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3. —— *Exemption — Hereditament belonging to society—" Instituted for purposes of " science, literature, or the fine arts exclusively " —Purposes of science and those incidental to such purposes, or collateral purposes—Constitution of society best evidence of purposes—Society supported wholly or in part by annual voluntary contributions—Meaning of " voluntary "—Government grant not a voluntary contribution—Scientific Societies Act,* 1843 (6 & 7 *Vict., c.* 36), *s.* 1.

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5. —— *Letting of some rooms in house—Retention of other rooms by landlord for personal use—Whether assessment committee entitled to assess for rating purposes the let rooms separated from the other rooms retained by landlord—Whether occupier of let rooms tenant or lodger—Whether landlord retained control over whole house—Rebuttable presumption that landlord retained control—Rating and Valuation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 23, *sub-s.* 1.

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6. —— *Steel-works — Land, buildings, plant and machinery—Valued as one hereditament on " the contractor's theory "—Certain short-lived plant with life of less than twenty years—Valued on a " unit " basis—Movable tilting furnaces and gas, cold blast and hot blast mains—Plant or machinery " in the " nature of a building or structure "—Criterion of movability—Plant and Machinery (Valuation for Rating) Order,* 1927 (*St. R. & O.* 1927, *No.* 480), *sch., class* 4.

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Bishopsgate Motor Finance Corporation, Ld. *v.* Transport Brakes, Ld. Winsor Garage, Third Party **C. A. 322**

2. —— *Sale by auction — Goods knocked down to bidder—Bidder's name written in sale catalogue by auctioneer conducting sale on behalf of firm—Claim by firm from bidder for price of goods—Sufficiency of note or memorandum—Sale of Goods Act,* 1893 (56 & 57 *Vict., c.* 71), *s.* 4.

Wilson & Sons *v.* Pike - **C. A. 176**

3. —— *See* Contract.

SHIPPING — *Charterparty — Demurrage — When loading completed—Bulk cargo—Wheat in 'tween decks to be stowed in bags—Load put on board but not bagged.*

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2. —— *Charterparty — Demurrage — When loading completed—" Steamer to be " loaded according to berth terms "—By rule of port all grain on 'tween decks to be bagged—Necessary for safety of ship—Grain delivered on 'tween decks at reduced flow and there bagged —Bagging continues after ceasing of delivery—Late delivery of grain charterers' fault—Loading involves all that is required in stowing—Bagging a part of the loading.*

Argonaut Navigation Co., Ld. *v.* Ministry of Food. S.s. Argobec **C. A. 572**

3. —— *Charterparty — Time charter — Suspension of hire in case of " deficiency of " men . . . . or other accident " — Full complement of crew on board but unwilling to work —War—Refusal of crew to sail except in convoy.*

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4. —— *Charterparty — Time charter — Obligation to pay hire—Suspension of, in case*

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of " deficiency of men or owners' stores . . . . " or other accident "—Full complement of officers and men on board vessel—Refusal, in time of war, to sail, unless in convoy—Unwillingness to work.

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5. —— *Freight — Demurrage — Charterparty — " Centrocon " — Construction — Cargo, part specified, part optional—Combined cargo less than deadweight capacity of ship for wheat in bags—Freight payable on steamer's deadweight capacity—" Steamer not to earn " more freight than she would if loaded with a " full cargo of wheat in bags "—Expenses of discharging—Saving on unloaded cargo—Whether deductible from freight—Calculation of lay days—Chamber of Shipping (River Plate) Charterparty,* 1914, *Homewards, cll.* 6, 13, 25.

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Langham *v.* Mayor, etc., of the City of London - - - - **C. A. 208**

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